Supreme Court, U.S.
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No. 01- 01 387

IN THE

Supreme Court of the United States

UNIROYAL CHEMICAL LIMITED
(now known as CROMPTON CO./CIE),

Petitioner,

v.

UNITED STATES OF AMERICA,
ARKANSAS DEPARTMENT OF POLLUTION CONTROL
AND ECOLOGY (now known as ARKANSAS
DEPARTMENT OF ENVIRONMENTAL QUALITY),
and HERCULES INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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98 pp

QUESTION PRESENTED FOR REVIEW

Whether a person who contracted to purchase herbicides, exercised no control over the manufacturer's disposal or treatment of hazardous substances, and possessed neither the authority nor the opportunity to control the manufacturer's disposal or treatment of hazardous substances may, nevertheless, be held liable as a person who "arranged for" the manufacturer's disposal or treatment of hazardous substances under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq*.

CORPORATE DISCLOSURE STATEMENT

As of January 30, 2001, the name of Uniroyal Chemical Limited was changed to Crompton Co./Cie.

Crompton Co./Cie is 100% owned by Uniroyal Chemical Netherlands B.V., a Dutch corporation.

Uniroyal Chemical Netherlands B.V. is 100% owned by Uniroyal Chemical Overseas B.V., a Dutch corporation.

Uniroyal Chemical Overseas B.V. is 100% owned by GT Seed International Company, a Texas corporation.

GT Seed International Company is 100% owned by Uniroyal Chemical International Company, a Texas corporation.

Uniroyal Chemical International Company is 71.6% owned by Crompton Manufacturing Company, Inc., a New Jersey corporation, and 28.4% owned by Uniroyal Chemical Brazil Holding, Inc., a Delaware corporation. (Uniroyal Chemical Brazil Holding, Inc., is 100% owned by Crompton Manufacturing Company, Inc.)

Crompton Manufacturing Company, Inc., is 100% owned by Crompton Corporation, a publicly traded Delaware corporation whose common stock is listed on the New York Stock Exchange.

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Uniroyal Chemical Limited ("Uniroyal") petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is published at *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) (Appendix A). The opinion of the United States District Court for the Eastern District of Arkansas is published at *United States v. Vertac Chemical Corporation*, 966 F. Supp. 1491 (E.D. Ark. 1997) (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on April 10, 2001. The Court of Appeals denied a timely petition for rehearing en banc on June 6, 2001 (Appendix C). This petition is filed within 90 days of June 6, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act provides, in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section — . . . (3) any person who by contract, agreement, or otherwise **arranged for disposal or treatment**, or arranged with a transporter for transport for disposal or treatment, **of hazardous substances owned or**

> **possessed by such person**, by another party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for — (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (emphasis added).

STATEMENT OF THE CASE

This petition arises from actions brought by the United States, the State of Arkansas, and Hercules Incorporated ("Hercules") against Uniroyal, seeking recovery of over $89 million in environmental remediation costs associated with the Vertac Chemical Corporation ("Vertac") site in Jacksonville, Arkansas, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* The District Court originally had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1335, 42 U.S.C. § 6973, and 33 U.S.C. § 1345. The District Court had subject matter jurisdiction over claims later added pursuant to 42 U.S.C. §§ 9607 and 9613. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The Vertac site was initially developed in the 1930s by the United States as a munitions factory. It was sold in the 1940s to Reasor-Hill Corporation ("Reasor-Hill"). Reasor-Hill began manufacturing herbicides there in the 1950s. Reasor-Hill produced trichlorophenoxyacetic acid ("2,4,5-T") at the site from the 1950s until 1961. In 1961, Hercules bought the site, and, in 1974, Hercules leased the site to Transvaal, Inc., the predecessor to Vertac. In 1976, Vertac bought the site from Hercules. Hercules produced 2,4,5-T at the site from 1961 to 1970. Vertac produced 2,4,5-T at the site from 1971 until production was stopped in 1979. The other principal product manufactured at the site, dichlorophenoxyacetic acid ("2,4-D"), was produced from the 1950s until 1986. *See United States v. Hercules, Inc.*, 247 F.3d 706, 711-13 (8th Cir. 2001).

The Court of Appeals summarized the pertinent facts:

> Uniroyal was a customer of Vertac's and purchased 2,4,5-T and other products of Vertac during the 1970s. In 1978, Vertac informed Uniroyal that it lacked the funds to purchase enough of 1,2,4,5-tetrachlorobenzene (TCB), a key ingredient in the manufacture of 2,4,5-T, to fulfill its regular contractual obligations to Uniroyal. Uniroyal consequently agreed to supply Vertac with enough TCB to create some 1.3 million pounds of 2,4,5-T that was shipped back to Uniroyal. Vertac did not purchase the TCB from Uniroyal, but rather reduced the amount it ultimately charged Uniroyal for the 2,4,5-T to reflect the value of the TCB that Uniroyal had supplied. This arrangement (a "toll conversion agreement") was embodied in two separate

> contracts and was carried out between March 1978 and March 1979. The 2,4,5-T that was produced with Uniroyal's TCB represents less than one percent of the more than 150 million pounds of 2,4-D and 2,4,5-T that were manufactured at the site over the course of its operation.

Id. at 713. The District Court found that Uniroyal owned the TCB throughout the manufacturing process. The Court of Appeals upheld this finding as not "clearly erroneous." *Id.* at 721.

Despite the factual issue as to the ownership of the TCB, the parties stipulated in the District Court that Uniroyal exercised no control over Vertac's manufacture of 2,4,5-T or over the operation of the Vertac plant. Although the other parties questioned the meaning of the stipulation in the District Court during the proceedings in the Court of Appeals, the District Court found that "Uniroyal was in no position to manage the disposal of any hazardous materials." *United States v. Vertac Chem. Corp.*, 70 F. Supp. 2d 1034, 1040 (E.D. Ark. 1999), *vacated on other grounds sub nom. United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001). Former employees and officers of Vertac testified in the District Court that Uniroyal had no authority to control Vertac's operations and that any attempt by Uniroyal to do so would have been strongly rebuffed. That Uniroyal did not have the authority or opportunity to control the disposal or treatment of hazardous substances at the Vertac site is implicit in the decisions of the District Court and the Court of Appeals. *See United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491 (E.D. Ark. 1997), *aff'd in part and rev'd and remanded in part sub nom. United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001).

Although Uniroyal neither controlled nor had the opportunity to control any aspect of Vertac's disposal of any hazardous substances, the District Court found Uniroyal liable as a person who "arranged for" the disposal or treatment of hazardous substances, holding that "actual control [is] not necessary for arranger liability." *Vertac Chem. Corp.*, 966 F. Supp. at 1501. The Court of Appeals affirmed that decision. *Hercules*, 247 F.3d at 720.

Uniroyal asks this Court to decide whether a person who contracted to purchase herbicides, exercised no control over the manufacturer's disposal or treatment of hazardous substances, and possessed neither the authority nor the opportunity to control the manufacturer's disposal or treatment of hazardous substances may, nevertheless, be held liable as a person who "arranged for" the manufacturer's disposal or treatment of hazardous substances under § 107(a). The transactions at issue between Uniroyal and Vertac involved approximately $1.5 million, yet the Court of Appeals' decision below could result in the imposition upon Uniroyal of liability for over $89 million in remediation costs. Beyond this inequity, the Court of Appeals' decision below deepened a split among the Circuit Courts of Appeals concerning the standard for imposing "arranger liability" under CERCLA. This petition thus raises a compelling issue which this Court should address. S. Ct. R. 10(a).

REASONS FOR GRANTING THE WRIT

Section 107(a)(3) of CERCLA imposes liability on "any person who by contract, agreement, or otherwise **arranged for** disposal or treatment . . . of hazardous substances . . . **owned or possessed by such person**. . . ." 42 U.S.C. § 9607(a)(3) (emphasis added). To be held liable

as an "arranger," a person must both "own[] or possess[]" hazardous substances and "arrange[] for" their disposal or treatment. *Id.*

"CERCLA does not define the phrase 'arranged for.' " *South Florida Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996) (internal citations omitted). *See also United States v. Cello-Foils Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) (same); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (same), *cert. denied*, 510 U.S. 1044 (1994). CERCLA's legislative history provides little guidance in determining the meaning of these words. *Montalvo*, 84 F.3d at 406 n.6; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989). "Congress has left this task to the courts, and the courts have at times struggled with the contours of 'arranger liability' under § 107(a)(3)." *Montalvo*, 84 F.3d at 406.

At one end of the spectrum, the United States Court of Appeals for the Second Circuit held:

> . . . Congress employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA as arrangers for the disposal of hazardous substances. Accordingly, this court concludes that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.

General Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) (emphasis in original).

The Second Circuit said that ". . . courts have found that ownership of hazardous substance, when combined with actual control over the process that generates the hazardous waste, supports arranger liability." *Id.* at 287. In the Second Circuit, even "the opportunity or ability to control a third-party's waste disposal practices" is not sufficient to hold a person "liable as an entity that 'otherwise arranged for' disposal or transport of hazardous waste." *Id.* at 286. The Second Circuit's opinion in *AAMCO Transmissions* was recently quoted by the United States Court of Appeals for the Fifth Circuit. *See Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 2592 (2001). Under the Second Circuit's standard (and likely in the Fifth Circuit), Uniroyal would not be held liable as an "arranger" for the disposal of hazardous substances.

The Court of Appeals below ignored "traditional notions of duty and obligation" and held that "[c]ontrol is not a necessary factor in every case of arranger liability." *United States v. Hercules, Inc.*, 247 F.3d 706, 720 (8th Cir. 2001). But Uniroyal not only exercised no control; it had neither the authority nor the opportunity to do so. Uniroyal contended that imposing "arranger liability" on it was inconsistent with the Court of Appeals' prior ruling in *United States v. Aceto Agricultural Chemicals Corporation*, 872 F.2d 1373 (8th Cir. 1989). In *Aceto*, the Court of Appeals emphasized that, because of an allegation of ownership, it was reasonable to infer from the complaint that the defendants had the authority to control the waste disposal practices at issue; yet, in the case at bar, the Court of Appeals discounted the importance of its conclusion in *Aceto* that there was a reasonable inference of authority to control.

Despite the fact that the Court of Appeals acknowledged in *Aceto* that there was no meaningful difference between the CERCLA claim and the RCRA claim, the Court of Appeals below said:

> Although we stated in *Aceto* that "it may be reasonably inferred that [defendants] had the authority to control the way in which the pesticides were formulated," . . . this observation came as part of our discussion of RCRA and was not necessary to our prior conclusion that the complaint stated a valid claim under CERCLA. Indeed, in the portion of *Aceto* that discussed CERCLA, we specifically rejected the defendants' contention that control is required in every circumstance. To support their argument, the defendants in *Aceto* quoted *NEPACCO*, 810 F.2d at 743, for the proposition that they should "escape liability because they had no authority to control" the formulation and disposal process. . . . We distinguished *NEPACCO* by observing that a finding of control had been necessary in that case only because ownership was lacking. . . . The *Aceto* defendants, however, unlike those in *NEPACCO*, "actually owned the hazardous substances, as well as the work in process," . . . and thus an arguable absence of control did not mandate dismissal of the complaint. Control, therefore, is not a necessary factor in every case of arranger liability. . . .

Hercules, 247 F.3d at 720 (internal citations omitted).

Drawing on the "traditional notions of duty and obligation" discussed by the Second Circuit, Uniroyal argued below that a finding of control makes imposing liability for harm just and equitable. The commonplace inference that ownership includes a right to control, as stated by the Eighth Circuit in *Aceto*, is consistent with the definition of ownership. *See* Black's Law Dictionary (7th ed. 1999) ("Ownership is the collection of rights allowing one to use and enjoy property.") Ownership "necessarily includes the right to control and dispose of the asset." *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485, 491, 958 P.2d 1, 7 (Ariz. App. 1997). Normally, as in *Aceto*, ownership allows an inference of control or, at a minimum, an inference of some authority to control. However, as the District Court and Court of Appeals below recognized, that inference is not permissible in this case.

Assuming *arguendo* that, throughout the manufacturing process, Uniroyal owned the TCB Uniroyal supplied to Vertac, Uniroyal did not own the hazardous substances resulting from the manufacturing process and did not "arrange for" the disposal or treatment of any hazardous substances. Indeed, Uniroyal "was in no position to manage the disposal of any hazardous materials." *United States v. Vertac Chem. Corp.*, 70 F. Supp. 2d 1034, 1040 (E.D. Ark. 1999), *vacated on other grounds sub nom. United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001). The Court of Appeals held below that the mere fact of ownership of the TCB made Uniroyal liable as an "arranger." However, § 107(a)(3) requires that Uniroyal both "owned or possessed" the hazardous substances **and** "arranged for" their disposal or treatment. Contrary to the Court of Appeals' holding, under § 107(a)(3), merely owning hazardous substances cannot equate with arranging for their disposal. The Court

of Appeals' decision read the words "arranged for" out of § 107(a)(3) and rendered the central language of the statute superfluous.

The United States Court of Appeals for the Eleventh Circuit interpreted the Eighth Circuit's decision in *Aceto* as Uniroyal did. The Eleventh Circuit rejected the plaintiffs reliance on *Aceto* in *South Florida Water Management District v. Montalvo*, 84 F.3d 402 (11th Cir. 1996). The *Montalvo* panel noted that, in *Aceto*, the Eighth Circuit had found that "it was possible to infer the manufacturers exercised some control over the formulator's mixing process." *Id.* at 408. The Eleventh Circuit found that the *Montalvo* plaintiffs had not alleged that the defendants "had sufficient knowledge of or control over plaintiffs' disposal practices to be held liable" as "arrangers" for the disposal of hazardous substances. *Id.* at 409. *See also Concrete Sales and Servs., Inc. v. Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir. 2000) ("If Congress wishes to impose liability on parties who contract for services that produce hazardous waste, it, not us, has the authority to do so. We emphasize, however, that our opinion does not foreclose the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise under 42 U.S.C. § 9607(a)(3)."). Like the Second Circuit, the Eleventh Circuit would not hold Uniroyal liable as an "arranger" under § 107(a)(3) of CERCLA.

Even before the decision below, the Eighth Circuit had advanced the most liberal interpretation of the words "arranged for." *See Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996). Other courts have questioned the Eighth Circuit's approach. For instance, the United States

Court of Appeals for the Third Circuit noted that it had "considered the viability of the [Eighth Circuit's] *Aceto* theory in *FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc), but . . . neither accepted nor rejected it as a basis for liability," as the en banc court was equally divided on the issue. *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 145 n.1 (3d Cir. 1999).

Still other courts have rejected the Eighth Circuit's approach outright. Although neither the United States Court of Appeals for the Tenth Circuit nor the United States Court of Appeals for the Fourth Circuit appears to have passed on the issue, United States District Courts in those Circuits have rejected the Eighth Circuit's interpretation of the words "arranged for." *See Mathews v. Dow Chem. Corp.*, 947 F. Supp. at 1525; *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339-40 (N.D. W. Va. 1997). *See also City of North Miami v. Berger*, 828 F. Supp. 401, 414 (E.D. Va. 1993) ("[N]either . . . had any operational control over the landfill and, as such, could not direct the movement or disposal of the wastes deposited therein. Accordingly, no CERCLA 'arranger' liability arises with respect to these defendants.").

At the same time, at least two other Courts of Appeals impose "arranger liability" in the absence of a finding of control. The United States Court of Appeals for the Sixth Circuit held that "a party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances." *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996). The appropriate inquiry, according to the Sixth Circuit, "is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous

substances." *Id.* at 1231. *Cf. Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) ("The words ['arranged for'] imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground."), *cert. denied*, 510 U.S. 1044 (1994).

Like the Sixth Circuit, the United States Court of Appeals for the Ninth Circuit has held that "[l]iability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process." *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994) (per curiam). *See also Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir. 1994) (while ownership or control of a hazardous substance is evidence of arranging for disposal, neither is required in every case of arranger liability).

This case highlights the confusion and unfairness created by the Courts of Appeals' use of different standards to decide "arranger liability." While the Second Circuit requires an **obligation** to control the disposal or treatment of hazardous substances to impose "arranger liability," the Court of Appeals below held Uniroyal liable as an "arranger" despite the absence of even the **opportunity** to control the disposal or treatment of the hazardous substances at issue. Liability for environmental cleanup costs is often tremendous, as in this case where Uniroyal could be exposed to liability for over $89 million. Such liability frequently threatens the viability of companies in the United States. Inconsistent construction of statutes such as CERCLA creates uncertainty and inequity in the marketplace. This Court, therefore, should resolve the split among the Circuit Courts of Appeals and provide a uniform standard for the imposition of "arranger liability."

CONCLUSION

For all these reasons, Uniroyal requests that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED APRIL 10, 2001

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 99-3684, 99-3685, 00-1473

UNITED STATES OF AMERICA; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY,

Plaintiffs/Appellees,

v.

HERCULES, INC.,

Defendant/Appellant,

VERTAC CHEMICAL CORPORATION; DEPARTMENT OF DEFENSE; DOW CHEMICAL CORPORATION,

Defendants,

UNIROYAL CHEMICAL LIMITED, formerly known as Uniroyal Limited,[1]

Defendant/Appellee,

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1. As of January 30, 2001, the name of this entity was changed to Crompton Co./Cie.

Appendix A

VELSICOL CHEMICAL CORPORATION; JOHN DOES, 1-5,

Defendants.

WASHINGTON LEGAL FOUNDATION; JOHN DOULL, Ph.D., M.D.; KARL K. ROZMAN, Ph.D.; WILLIAM J. WADDELL, M.D.; K. ROGER HORNBROOK, Ph.D.; DANIEL M. BYRD, III, Ph.D., D.A.B.T.; ROBERT GOLDEN, Ph.D.; B. FRANK VINCENT, Ph.D.; INTERNATIONAL SOCIETY OF REGULATORY TOXICOLOGY AND PHARMACOLOGY; AMERICAN COUNCIL ON SCIENCE AND HEALTH; THE ALLIED EDUCATIONAL FOUNDATION; FRANK B. CROSS; MICHAEL R. FOX, Ph.D.; GARY E. MARCHANT,

Amici on behalf of Appellant.

UNITED STATES OF AMERICA; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY,

Plaintiffs/Appellees,

v.

HERCULES, INC.,

Defendant/Appellee,

Appendix A

VERTAC CHEMICAL CORPORATION; DEPARTMENT OF DEFENSE; DOW CHEMICAL CORPORATION,

Defendants,

UNIROYAL CHEMICAL LIMITED, formerly known as Uniroyal Limited,

Defendant/Appellant,

VELSICOL CHEMICAL CORPORATION; JOHN DOES, 1-5,

Defendants.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY,

Plaintiff/Appellee,

v.

VERTAC CHEMICAL CORPORATION; HERCULES, INC., a Corporation,

Defendants.

Appendix A

WASHINGTON LEGAL FOUNDATION; JOHN DOULL, Ph.D., M.D.; KARL K. ROZMAN, Ph.D.; WILLIAM J. WADDELL, M.D.; K. ROGER HORNBROOK, Ph.D.; DANIEL M. BYRD, III, Ph.D., D.A.B.T.; ROBERT GOLDEN, Ph.D.; B. FRANK VINCENT, Ph.D.; INTERNATIONAL SOCIETY OF REGULATORY TOXICOLOGY AND PHARMACOLOGY; AMERICAN COUNCIL ON SCIENCE AND HEALTH; THE ALLIED EDUCATIONAL FOUNDATION; FRANK B. CROSS; MICHAEL R. FOX, Ph.D.; GARY E. MARCHANT,

Amici on behalf of Appellant,

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

VERTAC CHEMICAL CORPORATION,

Defendant,

HERCULES, INC.,

Defendant/Appellee,

DOW CHEMICAL CORPORATION,

Defendant,

UNIROYAL CHEMICAL LIMITED, formerly known as Uniroyal Limited,

Defendant/Appellant.

Appendix A

UNITED STATES OF AMERICA; ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY,

Plaintiffs,

HERCULES, INC.,

Defendant/Appellant,

VERTAC CHEMICAL CORPORATION; DEPARTMENT OF DEFENSE; DOW CHEMICAL CORPORATION,

Defendants,

UNIROYAL CHEMICAL LIMITED, formerly known as Uniroyal Limited,

Defendant/Appellee,

VELSICOL CHEMICAL CORPORATION; JOHN DOES, 1-5,

Defendants.

Submitted: June 12, 2000
Filed: April 10, 2001

* * *

Appendix A

Before WOLLMAN, Chief Judge, McMILLIAN, and BYE, Circuit Judges.

WOLLMAN, Chief Judge.

Hercules, Inc. (Hercules) and Uniroyal Chemical Co. (Uniroyal) raise various claims arising from a series of decisions made by the district court over the past decade finding them jointly and severally liable to the United States for environmental cleanup costs and allocating such costs between them pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1995 & Supp.2000), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L. No. 99-499, 11 Stat. 1613. We affirm in part and reverse and remand in part.

I. BACKGROUND

A. Factual History

This case involves the Vertac Chemical Plant site, a ninety-three acre tract of land in Jacksonville, Arkansas (the Jacksonville site or the site), that was originally developed by the federal government in the 1930s as a munitions factory. In the late 1940s the site was sold to a now-defunct company called Reasor-Hill Corporation (Reasor-Hill), which at first manufactured various pesticides but in 1958 began to make herbicides including dichlorophenoxyacetic acid (2,4-D) and trichlorophenoxyacetic acid (2,4,5-T), synthetic hormones that kill weeds or brush by accelerating growth to the point of natural death. Although these

herbicides rapidly biodegrade into harmless substances, the manufacture of 2,4,5-T (but not of 2,4-D) creates a byproduct, 2,3,7,8-tetrachlorodibenzo-p-dioxin (dioxin), that is now viewed as hazardous to humans. While Reasor-Hill operated the site, an unknown quantity of these and other untreated chemical wastes from the production process flowed through cooling ponds on the west side of the plant into a nearby stream. Other wastes were stored in numerous drums stacked in a field on the site.

Hercules bought the site from Reasor-Hill in 1961 and continued to manufacture herbicides, including 2,4-D and 2,4,5-T, at the plant until 1971. During this period Hercules sold the bulk of its product to the United States Department of Defense as the defoliant Agent Orange, a herbicide used in Vietnam to clear jungle undergrowth.[2] Soon after Hercules took over the site it buried the deteriorating drums of chemical waste left by Reasor-Hill in unlined trenches on the site. Hercules did not learn of the toxicity of dioxin until March of 1965, when a scientific study found that it could cause chloracne, a particularly persistent and disfiguring form of acne that typically affects the face, neck, and shoulders. Dioxin was subsequently linked to cancer.

Later in 1965, Hercules instituted a "toluene extraction" process designed to remove organic impurities from 2,4,5-T products. This process yielded residue ("stillbottoms") containing extremely high levels of dioxin. Hercules placed this residue in drums, some of which it buried at the site and some of which it disposed of at two nearby landfills.

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2. Agent Orange is made from a mixture of 2,4-D and 2,4,5-T. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1197 n. 6 (8th Cir.1990).

Appendix A

Although Hercules has acknowledged numerous leaks and spills during its operation of the site, the record indicates that Hercules generally improved the safety and cleanliness of the site and complied with environmental regulations between 1961 and 1971.

In 1971, Hercules ceased production at the site and leased the facility to Transvaal, Inc., which later became Vertac Chemical Corp. (Vertac). When Hercules ceased operations at the cite, it cleaned out all of its equipment and production vessels, buried its waste, and shipped empty drums off-site.

Initially, Vertac continued the production of 2,4-D and 2,4,5-T and followed Hercules's practice of burying most of the waste. In 1975, however, Vertac began shipping its 2,4-D waste to off-site landfills and began to store its 2,4,5-T stillbottoms above ground at the site with the hope that the waste might someday be recycled. In 1976, Hercules sold the site to Vertac, which continued its operations until 1986 and abandoned the site altogether when it went into receivership in 1987. By then there were nearly 29,000 waste-filled drums at the site that contained waste materials including 2,4-D, 2,4,5-T, and dioxin. Many of these drums had corroded and leaked, contaminating more soil, groundwater, and buildings at the site. Contamination was also found in other areas of the site, at the landfills, in nearby neighborhoods, and in grounds adjacent to the site.

Uniroyal was a customer of Vertac's and purchased 2,4,5-T and other products from Vertac during the 1970s. In 1978, Vertac informed Uniroyal that it lacked the funds to purchase enough 1,2,4,5-tetrachlorobenzene (TCB), a key

ingredient in the manufacture of 2,4,5-T, to fulfill its regular contractual obligations to Uniroyal. Uniroyal consequently agreed to supply Vertac with enough TCB to create some 1.3 million pounds of 2,4,5-T that was to be shipped back to Uniroyal. Vertac did not purchase the TCB from Uniroyal, but rather reduced the amount it ultimately charged Uniroyal for the 2,4,5-T to reflect the value of the TCB that Uniroyal had supplied. This arrangement (a "toll conversion agreement") was embodied in two separate contracts and was carried out between March 1978 and March 1979. The 2,4,5-T that was produced with Uniroyal's TCB represents less than one percent of the more than 150 million pounds of 2,4-D and 2,4,5-T that were manufactured at the site over the course of its operation.

Vertac was the last operator of the Jacksonville site. After it abandoned the plant, the United States Environmental Protection Agency (EPA) took over the site, closed down all operations, and assumed cleanup responsibilities that have cost well over $100 million to date.

B. Procedural History

The environmental cleanup undertaken at the site has resulted in extensive litigation over the past 20 years.[3] In 1980, the EPA sued Vertac and Hercules under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973 *et seq.*, the Clean Water Act, 33 U.S.C. § 1312 *et seq.*, and the Refuse Act, 33 U.S.C. § 407, seeking to enjoin the

3. For an account of some of the financial disputes between various contractors involved in the cleanup efforts at the site, see *Costner v. URS Consultants, Inc.*, 153 F.3d 667 (8th Cir.1998).

continuing discharge of hazardous waste at the site. The Arkansas Department of Pollution Control and Ecology (Arkansas) sought similar relief under state law. After consolidating the cases, the district court granted a preliminary injunction ordering Vertac to stop the chemical leakage from various disposal areas but denied relief against Hercules, which was not in possession or control of the site at the time. *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 888 (E.D.Ark.1980) (*Vertac I*). Several years later, the court approved consent decrees representing a negotiated remedial plan to address the containment and monitoring of waste. *United States v. Vertac Chemical Corp.*, 588 F.Supp. 1294, 1296-97 (E.D.Ark.1984) (*Vertac II*). The lawsuit was later converted into a CERCLA action.

Although Vertac stipulated that it was an owner and operator of the site liable to the government for response costs under CERCLA, it ultimately failed to comply with the consent decrees and eventually sold its assets to third parties, forcing the court in 1987 to appoint a receiver to handle the company's affairs. *United States v. Vertac Chemical Corp.*, 671 F.Supp. 595, 623-24 (E.D.Ark.1987) (*Vertac III*), *vacated*, 855 F.2d 856 (8th Cir.1988) (table); *United States v. Vertac Chemical Corp.*, 756 F.Supp. 1215 (E.D.Ark.1991) (*Vertac IV*), *aff'd*, 961 F.2d 796 (8th Cir.1992). In an effort to identify all those potentially liable for environmental harm at the site, numerous additional parties, including the United States Department of Defense, were brought into the suit.[4] These parties filed various

4. The Department of Defense was found not liable. *United States v. Vertac Chemical Co.*, 841 F.Supp. 884, 891 (E.D.Ark.1993) (*Vertac V*), *aff'd*, 46 F.3d 803 (8th Cir.1995) (*Vertac VI*).

cross-claims, counterclaims, and third party complaints; many of the parties settled and entered into consent decrees.[5]

Beginning in 1993, the district court issued a number of decisions that are the subject of the instant appeal. On October 12, 1993, it entered an order of partial summary judgment in favor of the United States. Dist. Ct. Order at 5 (Oct. 12, 1993) *Vertac V*, 841 F.Supp. 884, 891. The court found Hercules jointly and severally liable under CERCLA for the release of hazardous substances at the Jacksonville site, landfills, neighborhoods, and off-site areas, and rejected Hercules's argument that the harm at the site was divisible. The court reiterated these conclusions on November 1, 1993, and again on May 5, 1998, when it denied motions for reconsideration brought by Hercules.

The remaining claims in the case went to trial on November 3, 1993, before an advisory jury. The jury rejected Hercules's claim for response costs and contribution against Standard Chlorine of Delaware, Inc., a party not involved in this appeal. Uniroyal was found liable to the United States, Arkansas, and Hercules for remediation of wastes at the site and off-site areas. The jury also found that the harm caused by Uniroyal was divisible. Thereafter, the district court filed an opinion in which it endorsed all of the jury's findings except its conclusion regarding divisibility. *United States v. Vertac Chemical Corp.*, 966 F.Supp. 1491, 1501-04 (E.D.Ark.1997) (*Vertac VIII*).

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5. Additional parties have attempted to intervene in the Jacksonville site cleanup over the years. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 992 F.2d 145 (8th Cir.1993).

The United States subsequently moved for summary judgment on the issue of cost recoverability, which the district court granted on October 23, 1998. The court rejected several arguments raised jointly by Hercules and Uniroyal in an attempt to establish that the EPA's response decisions were arbitrary and capricious. It declined to consider their takings and due process claims, which it characterized as illegitimate attempts to "relitigate liability." *United States v. Vertac Chemical Corp.*, 33 F.Supp.2d 769, 785 (E.D.Ark.1998) (*Vertac IX*). Accordingly, on August 6, 1999, the court entered judgments of joint and several liability against Hercules in the amount of $100,560,491 plus interest and costs, and against Uniroyal in the amount of $89,084,710 plus interest and costs.

Finally, on December 28, 1999, the district court addressed the issue of allocation of costs between Hercules and Uniroyal for the more than $89 million for which they were both jointly and severally liable.[6] Acknowledging that "Uniroyal and Hercules are left 'holding the bag' for Vertac, who at least arguably caused the greatest amount of harm," Dist. Ct. Order at 3 (Dec. 28, 1999) *U.S. v. Vertac Chemical Corp.*, 79 F.Supp.2d 1034, 1036 (E.D.Ark., 1999) (*Vertac X*), the court determined that Hercules's share of the response costs should be 97.4 percent and Uniroyal's share should be 2.6 percent. *Id.* at 1041. A judgment reflecting these conclusions was entered on February 8, 2000.

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6. The additional $11,182,781 for which Hercules was liable was based on costs associated with the two landfills not at issue in the allocation phase.

On appeal, Hercules challenges the 1993 entry of partial summary judgment and the court's subsequent denials of its motions to reconsider. Uniroyal challenges the district court's 1997 adoption of the advisory jury's liability verdict but not its rejection of the divisibility verdict. Hercules and Uniroyal together appeal the 1998 recoverability order. Only Hercules appeals the 1999 allocation decision. These appeals have been consolidated.

II. CERCLA

A. Background

CERCLA authorizes the federal government to respond to any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat. 42 U.S.C. § 9604. Cleanup decisions are guided by the National Contingency Plan (NCP), which prescribes methods for investigating health and environmental problems resulting from a release or threatened release and establishes criteria for determining the appropriate extent of response activities. 42 U.S.C. § 9605; 40 C.F.R. Part 300; *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 894 (5th Cir.1993). Although response activities are initially funded by the Superfund, a multi-billion-dollar fund financed through a combination of appropriations, EPA fees, and industry taxes, 26 U.S.C. § 9507(b), CERCLA provides for the subsequent recovery of response costs from all parties responsible for the release of a hazardous substance. 42 U.S.C. §§ 9607, 9611.

To establish that a party is liable, CERCLA section 9607(a) requires the government to prove that there has been

a release or threat of release of a hazardous substance at a "facility," as a result of which the United States incurred response costs that were necessary and consistent with the NCP, and that the defendant falls within one of four listed categories of responsible parties. 42 U.S.C. § 9607(a); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 (8th Cir.1995). The categories are: (1) current owners or operators of a site at which a release or threatened release occurred; (2) owners or operators of such a site at the time of disposal of hazardous material; (3) generators who arranged for disposal at such a site; and (4) transporters of hazardous waste to such a site. *Id.* CERCLA liability attaches "[n]otwithstanding any other provision or rule of law, and subject only to" three narrowly defined defenses.[7] 42 U.S.C. § 9607(a) & (b). Liability is strict and is typically joint and several. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 n. 3 (8th Cir.1986) (*NEPACCO*). Where multiple defendants are involved, the initial liability finding is followed by a contribution proceeding to allocate damages among responsible parties. *Control Data,* 53 F.3d at 934.

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7. These absolute defenses encompass (1) acts of God, (2) acts of war, and (3) acts or omissions of unrelated third parties where the defendant "establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b).

Appendix A

B. Divisibility of Harm

One aspect of CERCLA that has long vexed courts is the role of causation in the statutory scheme. *Id.* at 935 (describing the causation element as a "problematic portion" of the CERCLA calculus). This is because, "[a]lthough the simplistic slogan 'make the polluter pay' may have helped propel CERCLA into law, the statutory scheme does not take a simplistic view of who is and who is not a 'polluter.' " *Westfarm Assoc. Ltd. Partnership v. Washington Suburban Sanitary Comm'n,* 66 F.3d 669, 681 (4th Cir.1995) (citation omitted). Indeed, at least at the liability stage, the language of the statute does not require the government to prove as part of its prima facie case that the defendant caused any harm to the environment. *Control Data,* 53 F.3d at 935. Rather, once the requisite connection between the defendant and a hazardous waste site has been established (because the defendant fits into one of the four categories of responsible parties), it is enough that response costs resulted from "a" release or threatened release — not necessarily the defendant's release or threatened release.[8] 42 U.S.C.

8. Although we have stated that "CERCLA focuses on whether *the defendant's* release or threatened release caused harm to the plaintiff in the form of response costs," *Control Data,* 53 F.3d at 935 (emphasis added), the case we cited for that proposition referred not to the defendant's release but merely to "a" release, *General Electric Company v. Litton Industrial Automation Systems, Inc.,* 920 F.2d 1415, 1417 (8th Cir.1990) *abrogated on other grounds, Key Tronic Corp. v. United States,* 511 U.S. 809, 814, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). The argument that the government must prove a direct causal link between the incurrence of response costs and an actual release caused by a particular defendant has been rejected by "virtually every court" that has directly considered the issue. *United States v. Alcan Alum. Corp. (Alcan I),* 964 F.2d 252, 264-65 (3d Cir.1992) (citing cases); *see* 42 U.S.C. § 9607(a)(4).

§ 9607(a)(4). Thus, the government need not trace or "fingerprint" a defendant's wastes in order to recover under CERCLA. *United States v. Monsanto,* 858 F.2d 160, 169-70 (4th Cir.1988). Considerations of causation explicitly enter into the statutory liability scheme only as part of the three statutory defenses not at issue in this case. *Id.* at 170; 42 U.S.C. § 9607(b).

Many courts, however, have recognized the defense of divisibility of harm, a "special exception to the absence of causation requirement" that in effect brings causation principles "back into the case — through the backdoor, after being denied entry at the front door." *United States v. Alcan Alum. Corp.*, 990 F.2d 711, 722 (2d Cir.1993) (*Alcan II*); *see United States v. Township of Brighton,* 153 F.3d 307, 317-19 (6th Cir.1998); *Bell,* 3 F.3d at 894-902; *Alcan I,* 964 F.2d at 268-69; *O'Neil v. Picillo,* 883 F.2d 176, 178-79 (1st Cir.1989); *Monsanto,* 858 F.2d at 171-73. Although we have not been squarely presented with the question whether a divisibility defense should be allowed under CERCLA, we have expressed our approval of the doctrine on several occasions. *Control Data,* 53 F.3d at 934 n. 4 ("Once liability is proved, all of the defendants are jointly and severally liable, unless a particular defendant can establish that his harm is divisible, a very difficult proposition."); *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 808 (8th Cir.1993) (remanding for liability findings and suggesting that the district court might find divisible harms); *cf. United States v. Dico, Inc.*, 136 F.3d 572, 578-79 (8th Cir.1998) (remanding for trial on liability because district court failed to distinguish between two geographically separate areas within single hazardous waste site).

Appendix A

The parties in this case do not dispute the general validity of the divisibility doctrine, and we find it to be both compatible with the text and the overall statutory scheme of CERCLA[9] and a sensible way to avoid imposing on parties excessive liability for harm that is not fairly attributable to them. *See Alcan I,* 964 F.2d at 269. We thus proceed to a more detailed discussion of the doctrine.

The universal starting point for divisibility of harm analyses in CERCLA cases is the Restatement (Second) of Torts, which provides for the apportionment of damages among two or more parties when at least one is able to show either (1) "distinct harms" or (2) a "reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965); *see Township of Brighton,* 153 F.3d at 318; *Bell,* 3 F.3d at 895; *Chem-Dyne,* 572 F.Supp. at 810. We will follow the Restatement, however, only to the extent that it is compatible with the provisions of CERCLA. *See O'Neil,* 883 F.2d at 179 n. 4 (describing the Restatement as "one source for us to consult"). Thus, for example, although the Restatement contemplates that plaintiffs bear the burden of proving causation, in a CERCLA case, once the government has

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9. Other courts have persuasively argued, based on the legislative history surrounding CERCLA and its 1986 Superfund amendments, that the divisibility of harm doctrine is consistent with the intent of Congress that " 'traditional and evolving common law principles' should define the scope of liability under CERCLA." *Redwing Carriers, Inc. v. Saraland Apts.,* 94 F.3d 1489, 1513 (11th Cir.1996) (quoting *Bell,* 3 F.3d at 895); *see O'Neil,* 883 F.2d at 178-79; *Monsanto,* 858 F.2d at 171 n. 23; *United States v. Chem-Dyne Corp.,* 572 F.Supp. 802, 805-08 (S.D.Ohio 1983).

established the four essential elements of liability the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility. *Township of Brighton,* 153 F.3d at 318; *O'Neil,* 883 F.2d at 182. Divisibility generally limits the scope of, but does not entirely eliminate, CERCLA liability since the doctrine is essentially a defense only to joint and several liability. *Control Data,* 53 F.3d at 934 n. 4; *Bell,* 3 F.3d at 895.

We have previously observed that proving divisibility is a "very difficult proposition," *Control Data,* 53 F.3d at 934 n. 4, and the Restatement recognizes that some harms, "by their nature, are normally incapable of any logical, reasonable, or practical division." Restatement (Second) of Torts § 433A cmt. to subsection (2) (1965), *quoted in Bell,* 3 F.3d at 896. Where this is the case, the Restatement cautions against making an "arbitrary apportionment for its own sake." *Id.; see also United States v. Colorado & Eastern R. Co.,* 50 F.3d 1530, 1535 (10th Cir.1995) (noting that "the courts have been reluctant to apportion costs" and that "responsible parties rarely escape joint and several liability"); *O'Neil,* 883 F.2d at 183 (defendants hoping to escape joint and several liability must satisfy the "stringent burden placed on them by Congress"). When a defendant is successful in demonstrating a reasonable basis for apportionment, approaches to divisibility will vary tremendously depending on the facts and circumstances of each case. Evidence of divisibility will focus on determining the amount of harm caused by the defendant. *Bell,* 3 F.3d at 903. Our description below of some of the most common approaches is by no means intended to be exhaustive, for "we know that we cannot define for all time what is a reasonable basis for divisibility and what is not." *Township of Brighton,* 153 F.3d at 319.

Appendix A

"Distinct harms" are those that may properly be regarded as separate injuries. *See* Restatement (Second) of Torts § 433A (1965); *Bell,* 3 F.3d at 895. Defendants may be able to demonstrate that harms are distinct based on geographical considerations, such as where a site consists of "non-contiguous" areas of soil contamination, *Akzo Coatings, Inc. v. Aigner Corp.,* 881 F.Supp. 1202, 1210 (N.D.Ind.1994), *clarified on reconsid.,* 909 F.Supp. 1154 (N.D.Ind.1995), or separate and distinct subterranean "plumes" of groundwater contamination, *United States v. Broderick Investment Co.,* 862 F.Supp. 272, 277 (D.Colo.1994).

Other cases, by contrast, involve a "single harm" that is nonetheless divisible because it is possible to discern the degree to which different parties contributed to the damage. *Id.* The basis for division in such situations is that "it is clear that each [defendant] has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other," such as where "two defendants, independently operating the same plant, pollute a stream over successive periods of time." *Bell,* 3 F.3d at 895. Single harms may also be "treated as divisible in terms of degree," based, for example, on the relative quantities of waste discharged into the stream. *Id.* at 895-96. Divisibility of this type may be provable even where wastes have become cross-contaminated and commingled, for "commingling is not synonymous with indivisible harm." *Alcan II,* 990 F.2d at 722; *see also Bell,* 3 F.3d at 903.

Evidence supporting divisibility must be concrete and specific. *See United States v. Alcan Alum. Corp.,* 892 F.Supp. 648, 657 (M.D.Pa.1995) (*Alcan III*) (rejecting divisibility

argument on remand because defendant took "all or nothing approach," presenting no new evidence beyond what court of appeals had already considered), *aff'd*, 96 F.3d 1434 (3d Cir.1996) (table). The preliminary issue of whether the harm to the environment is capable of apportionment among two or more causes is a question of law. *Bell*, 3 F.3d at 902. Then, "[o]nce it has been determined that the harm is capable of being apportioned among the various causes of it, the actual apportionment of damages is a question of fact." *Id.* at 896.

We also observe that the divisibility doctrine is conceptually distinct from contribution or allocation of damages. *See Redwing*, 94 F.3d at 1513. At the allocation phase, the only question is the extent to which a defendant's liability may be offset by the liability of another; the inquiry at this stage is an equitable one and courts generally take into account the so-called "Gore factors." *See* 42 U.S.C. § 9613(f) (providing that a court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"); *Township of Brighton*, 153 F.3d at 318; *Control Data*, 53 F.3d at 935. The divisibility of harm inquiry, by contrast, is guided not by equity — specifically, not by the Gore factors — but by principles of causation alone. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280-81 (3d Cir.1993). Thus, where causation is unclear, divisibility is not an opportunity for courts to "split the difference" in an attempt to achieve equity.[10] *Township of*

10. Accordingly, we reject any suggestion that the financial condition of the parties should play a role in a CERCLA divisibility analysis. *But see Bell*, 3 F.3d at 896 (noting that the Restatement

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Brighton, 153 F.3d at 319. Rather, "[i]f they are in doubt, district courts should not settle on a compromise amount that they think best approximates the relative responsibility of the parties." *Id.* In such circumstances, courts lacking a reasonable basis for dividing causation should avoid apportionment altogether by imposing joint and several liability. *Id.*

III. ANALYSIS

A. Hercules

Hercules challenges the district court's imposition of joint and several liability, raising various divisibility arguments that are specific to certain areas of the site, off-site areas, neighborhoods, and landfills. In some of these arguments Hercules urges us to reverse outright the entry of summary judgment against it and instruct the district court to deduct from the final judgment all response costs pertinent to the area at issue; in others it asks us to hold simply that there is a reasonable basis for divisibility and remand to the district court to apportion the harm. We review the district court's October, 1993, summary judgment decision (*Vertac V*) de novo, viewing the evidence in the light most favorable to the nonmoving party. *Dico,* 136 F.3d at 578. We will affirm only if we conclude that there are no genuine issues of

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allows courts to consider insolvency); *id.* at 902 n. 13 ("[T]here may be exceptional cases in which it would be unjust to impose several liability, such as when one of the defendants is so hopelessly insolvent that the plaintiff will be unable to recover any damages from it.").

material fact and that the United States is entitled to judgment as a matter of law. *United States v. Findett Corp.*, 220 F.3d 842, 845 (8th Cir.2000); Fed.R.Civ.P. 56.

We believe that the district court's analysis of Hercules's divisibility arguments reflects a fundamental misunderstanding of the doctrine of divisibility. These legal errors clouded the court's view of the evidence supporting divisibility. For example, when the district court discussed divisibility in *Vertac V*, it did so in summary fashion, stating merely that "Hercules has not set forth any facts establishing that the harm is clearly divisible, or that Hercules' waste did not, or could not, contribute to the release and the resulting response costs at the site." *Vertac V*, Dist. Ct. Order at 4 (Oct. 12, 1993). The proper standard for determining divisibility, however, is that the defendant show either distinct harms or a "reasonable basis" for apportioning causation for a single harm. Restatement (Second) of Torts § 433A (1965). A defendant need not prove that its "waste did not, or could not, contribute" to any of the harm at a CERCLA site in order to establish divisibility, because it is also possible to prove divisibility of single harms based on volumetric, chronological, or other types of evidence. *Beil*, 3 F.3d at 895-96. A site may also be divisible if a defendant can establish that it consists of "non-contiguous" areas of contamination. *Akzo*, 881 F.Supp. at 1210; *Broderick*, 862 F.Supp. at 277.

Accordingly, we reverse the summary judgment against Hercules on the issue of liability (*Vertac V*) and remand so that the district court can address the evidence supporting divisibility in light of the proper legal standards. In so

holding, we reject the EPA's suggestion that evidence adduced subsequent to summary judgment — specifically, evidence presented against Uniroyal at the 1993 liability trial and evidence from the 1998 allocation trial — incontrovertibly demonstrates that Hercules cannot prevail on any of its divisibility arguments. By the same token, we deny Hercules's request that we reverse the district court's decision outright and hold that certain harms were divisible, for we conclude that the question of divisibility is one to be determined in the first instance by the district court.

B. Uniroyal

Uniroyal challenges the district court's conclusion that it fits within one of CERCLA's four categories of responsible parties — namely, that it is liable as an "arranger" under 42 U.S.C. § 9607(a)(3). Uniroyal does not contest the other three relevant statutory elements of CERCLA liability. We review the district court's factual findings for clear error and its legal conclusions de novo. *Consolidated Electrical & Mechanicals, Inc. v. Biggs General Contracting, Inc.*, 167 F.3d 432, 434 (8th Cir.1999).

In *Vertac VIII*, the district court noted that we have "given a liberal interpretation to 'arranger liability.' " *Vertac VIII*, 966 F.Supp. at 1501. The court made this observation in light of our decision in *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir.1989), in which we declined to dismiss a CERCLA complaint alleging that a number of pesticide manufacturers were liable for supplying to a formulator materials used to create a final product where (1) the suppliers retained an ownership interest in the

materials throughout the formulation process as well as in the finished product, (2) the generation of wastes was inherent in the formulation process, and (3) wastes were in fact generated and disposed. *Id.* at 1378-82. In *Vertac VIII*, 966 F.Supp. at 1501, the district court found that Uniroyal's toll conversion agreement to supply TCB to Vertac for formulation into 2,4,5-T closely tracked the legal standards set forth in *Aceto*, and on appeal the EPA argues that this case is "nearly identical" to *Aceto*. We agree.

Uniroyal first contends that the district court erred as a matter of law by focusing its analysis on ownership, and not on the authority to control the production and disposal process. Uniroyal argues that in *Aceto*, a case that considered no actual facts but only the prima facie validity of a complaint, ownership was deemed significant only insofar as it gave rise to a permissible inference of authority to control. Here, by contrast, Uniroyal suggests that the district court erroneously elevated mere ownership to the level of a sufficient basis for finding arranger liability. We conclude that this argument fails.

Although we stated in *Aceto* that "it may be reasonably inferred that [defendants] had the authority to control the way in which the pesticides were formulated," *id.* at 1383, this observation came as part of our discussion of RCRA and was not necessary to our prior conclusion that the complaint stated a valid claim under CERCLA. Indeed, in the portion of *Aceto* that discussed CERCLA, we specifically rejected the defendants' contention that control is required in every circumstance. To support their argument, the defendants in *Aceto* quoted *NEPACCO*, 810 F.2d at 743, for

the proposition that they should "escape liability because they had no authority to control" the formulation and disposal process. *Aceto*, 872 F.2d at 1381-82. We distinguished *NEPACCO* by observing that a finding of control had been necessary in that case only because ownership was lacking. *Id.* at 1382. The *Aceto* defendants, however, unlike those in *NEPACCO*, "actually owned the hazardous substances, as well as the work in process," *id.*, and thus an arguable absence of control did not mandate dismissal of the complaint. Control, therefore, is not a necessary factor in every case of arranger liability. *See also United States v. TIC Investment Corp.*, 68 F.3d 1082, 1087-88 (8th Cir.1995) (holding that a finding of arranger liability requires either control over, or "some level of participation in," activities related to the arrangement of hazardous waste disposal).

Uniroyal also challenges the district court's factual finding that Uniroyal "retained an ownership interest in its material during the processing stage" and "owned the 2,4,5-T that was returned." *Vertac VIII*, 966 F.Supp. at 1501. In reaching this determination, the district court relied heavily on the fact that Uniroyal, which purchased its TCB in Europe, imported it into the United States under a temporary import bond to avoid the payment of taxes and duties. *Id.* at 1498-99. Under the terms of the bond, the Customs Office required, throughout the toll agreement transaction, that Uniroyal maintain ownership of the TCB. Uniroyal agreed to have the TCB processed into 2,4,5-T for shipment to Canada within one year. *Id.* That Uniroyal's interactions with Vertac in fact met these demands is supported by a 1982 letter that was sent by a Uniroyal attorney to the Customs Commissioner as part of a dispute over the bond requirements.

On appeal, however, Uniroyal argues that the terms of the temporary import bond cannot change the "real character" of its interaction with Vertac, which it describes as having involved so much intermingling of materials that Uniroyal could not have owned either the "work in process" or the finished product throughout the entire transaction. To bolster its position, Uniroyal points to the testimony of Robert Ellis, Vertac's controller of the Jacksonville plant, in which Ellis explained that Uniroyal's supply arrangement with Vertac differed from typical toll conversion agreements in several respects. Ellis testified, for example, that TCB was only one ingredient out of a total of seven materials required to produce 2,4,5-T (albeit "the key ingredient," *Vertac VIII,* 966 F.Supp. at 1498), and that many of the bookkeeping practices of Vertac and Uniroyal during the agreement period were compatible with the view that Vertac owned the TCB throughout the formulation process.

Although we find the ownership issue to be debatable, the evidence in favor of Uniroyal's position is not strong enough to convince us that the district court's resolution of this factual dispute is clearly erroneous — a conclusion that demands a definite and firm conviction on our part that a mistake has been made. *Consolidated Electrical,* 167 F.3d at 434. In deciding questions of arranger liability, we do not rely on bright-line rules but look to the totality of the circumstances to determine whether the facts of a given case fit within CERCLA's "overwhelmingly remedial scheme." *NEPACCO,* 810 F.2d at 733, *quoted in Aceto,* 872 F.2d at 1380; *see TIC Investment,* 68 F.3d at 1090 (totality of the circumstances). Even were we to conclude that, on balance, Uniroyal and Vertac intended the supply of TCB to be

technically considered a "sale," we have "not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance." *Aceto,* 872 F.2d at 1381. Here, where Uniroyal provided Vertac with the main ingredient necessary for the production of 2,4,5-T during a period of financial difficulty for Vertac, and was not charged for the TCB until the relevant amount was offset against its final purchase price, we see no basis to reverse the district court's finding that Uniroyal owned the material throughout the transaction and thus qualified as an "arranger" under CERCLA. Accordingly, we affirm the judgment of liability against Uniroyal (*Vertac VIII*).

C. Other Arguments

Because we remand the case on the antecedent issue of liability, we decline to address questions related to recoverability or contribution, nor do we address Hercules's constitutional arguments. *See Int'l Assoc. of Firefighters, Local No. 3808 v. Kansas City,* 220 F.3d 969, 975 (8th Cir.2000).

Uniroyal also presents takings and due process challenges to the retroactive application of CERCLA in this case. It argues, relying on *Eastern Enterprises v. Apfel,* 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), that the imposition of liability in this instance is unconstitutional because the liability could not be anticipated and because it is substantially disproportionate to Uniroyal's conduct related to the pollution at the site and in the surrounding areas. We decline to address these arguments for two reasons.

First, we believe that Uniroyal's constitutional arguments are not ripe for our consideration. Without addressing the merits of Uniroyal's claims, we observe that it essentially presents an as-applied constitutional challenge to CERCLA. Because we are vacating the recoverability and contribution judgments, however, there exists no final judgment of liability against Uniroyal. This determination will be made by the district court on remand. Because we can only speculate as to what conclusions the district court may reach, it would be premature for us to address the question of whether Uniroyal's liability is unconstitutionally disproportionate to its underlying conduct. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation omitted) (federal courts should not address hypothetical or abstract disputes).

Second, we observe that Uniroyal presents only skeletal constitutional arguments of its own while purporting to incorporate and adopt Hercules's more thorough constitutional analysis. We note, however, that an inquiry into the constitutionality of CERCLA in this case would be "essentially ad hoc and fact intensive." *See Eastern Enterprises,* 524 U.S. at 523, 118 S.Ct. 2131 (1998) (plurality opinion). Because the record indicates that Hercules's potential liability in this case is predicated on facts materially different from those underlying Uniroyal's liability, and because the ultimate liability of both Hercules and Uniroyal remains unknown, we conclude that Uniroyal has not adequately briefed the complexities involved in its constitutional challenge to CERCLA.

Appendix A

IV. Conclusion

The summary judgment against Hercules on the issue of liability (*Vertac V*) is reversed. On remand, the district court should address Hercules's divisibility arguments. The judgment of liability against Uniroyal (*Vertac VIII*) is affirmed. The judgments of recoverability (*Vertac IX*) and contribution (*Vertac X*) are vacated; these issues should be revisited by the district court following further proceedings consistent with this opinion. All pending motions to strike are denied.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS DATED MAY 21, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Civil Nos. LR-C-80-109, LR-C-80-110

UNITED STATES OF AMERICA,

Plaintiff and Counterclaim Defendant,

v.

VERTAC CHEMICAL CORP.,

Defendant, Counterclaimant, Cross Claimant, and Third Party Plaintiff;

and

HERCULES INCORPORATED,

Defendant, Cross Claim Defendant, Counterclaimant, Cross Claimant and Third Party Plaintiff;

and

THE DOW CHEMICAL COMPANY, VELSICOL CHEMICAL CORPORATION, BASF AKTIENGESELLSHAFT, BASF CORPORATION, UNIROYAL CHEMICAL, LTEE-LTD., STANDARD CHLORINE OF DELAWARE, INC. and FIVE JOHN DOES,

Third Party Defendants.

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ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

v.

VERTAC CHEMICAL CORP.,

Defendant, Counterclaimant, Cross Claimant, and Third Party Plaintiff;

and

HERCULES INCORPORATED,

Defendant, Cross Claim Defendant, Cross Claimant; and Third Party Plaintiff;

and

THE DOW CHEMICAL COMPANY, VELSICOL CHEMICAL CORPORATION, BASF AKTIENGESELLSHAFT, BASF CORPORATION, UNIROYAL CHEMICAL, LTEE-LTD., STANDARD CHLORINE OF DELAWARE, INC. and FIVE JOHN DOES,

Third Party Defendants.

May 21, 1997.

* * *

Appendix B

MEMORANDUM OPINION AND ORDER

GEORGE HOWARD, Jr., District Judge.

This case involves a 93-acre tract of land in Jacksonville, Arkansas known as the Vertac Site ("Vertac Site" or "Site").[1] As a result of the herbicide production at the Site, the land, buildings, equipment, groundwater, sewer lines, two sewage treatment plants, and floodplains and adjacent creeks became contaminated with 2,3,7,8-TCDD ("dioxin") and other chlorinated carbon compounds. The Vertac Site and Off-Site Areas[2] are on the National Priority List of Superfund cleanup sites established pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

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1. The history of the Vertac Site and Off-Site areas has been discussed in a number of decisions. *See United States v. Vertac Chemical Corp.*, 489 F.Supp. 870 (E.D.Ark.1980); *United States v. Vertac Chemical Corp.*, 588 F.Supp. 1294 (E.D.Ark.1984); *United States v. Vertac Chemical Corp.*, 671 F.Supp. 595 (E.D.Ark.1987), *vacated*, 855 F.2d 856 (8th Cir.1988); *United States v. Vertac Chemical Corp.*, 756 F.Supp. 1215 (E.D.Ark.1991), *aff'd* 961 F.2d 796 (8th Cir.1992); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194 (8th Cir.1990); *United States v. Vertac Chemical Corp.*, 841 F.Supp. 884 (E.D.Ark.1993), *aff'd* 46 F.3d 803 (8th Cir.1995), *cert. denied*, 515 U.S. 1158, 115 S.Ct. 2609, 132 L.Ed.2d 853 (1995).

2. The Off-Site areas include Rocky Branch Creek sediments and floodplains, Bayou Meto sediments and floodplains, the Jacksonville old sewage treatment plant and west wastewater treatment plant, and the sewer collection lines.

Appendix B

Procedural Background and History

The Vertac Site was originally developed by the United States government in the mid-1930's as a munitions factory. *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 873 (E.D.Ark.1980). Sometime between 1946 and 1948, the Site, including the munitions buildings, was sold to a now defunct corporation known as Reasor-Hill Corporation ("Reasor-Hill"). Reasor-Hill made pesticides, including aldrin, dieldrin, and DDT at the Site.

In 1958, Reasor-Hill began the manufacture of phenoxy herbicides, primarily 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"), 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichloropropionic acid ("Silvex" or "2,4,5-TP"). *See Id.* at 873-4. During the Reasor-Hill years, waste water from the production process ran through two cooling ponds on the west side of the plant directly to Rocky Branch Creek. Reasor-Hill had no treatment to process the waste water. The amount of waste generated during that period of time is unknown.

In 1961, Hercules, Inc. ("Hercules") bought the Jacksonville facility from Reasor-Hill, and continued the production of phenoxy herbicides, including 2,4,5-T, 2,4-D, and 2,4,5-TP. Hercules operated the plant until 1971. Shortly after it acquired the plant site from Reasor-Hill, Hercules buried drums of chemical waste left over from the Reasor-Hill operations on the Site.

From 1964 through 1968, Hercules produced and supplied to the United States Department of Defense an

herbicide known as Agent Orange, used as a defoliant in Vietnam. *See United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir.1995). Agent Orange is a 50/50 mix of the n-butyl esters of 2,4-D and 2,4,5-T. During the Agent Orange production process, dioxin is formed as a by- product.

Hercules learned of the presence of dioxin in 1965, and thereafter began testing for the presence of dioxin in its product. In that same year, Hercules began converting its method of production to a "toluene extraction" system. During the process, dioxin and other impurities that were extracted underwent a distillation process producing residue (stillbottoms) in which extremely high levels of dioxin were found. Hercules buried drums of toluene stillbottoms at the Site and disposed of them in the landfill areas.

There were numerous leaks and spills during the time that Hercules operated the plant. According to testimony at trial, the leaks and spills were a common occurrence. During the time it operated the plant, Hercules generated hazardous substances, including dioxin, 2,4-D, 2,4,5-T, and other chlorinated carbon-based chemicals which were disposed of at the Vertac Site and Off-Site areas through leaks, spills, drum burial, and other releases into the environment, including discharges through the Jacksonville sewage treatment plant. The Hercules operation resulted in contamination of soil, groundwater, equipment, tanks, sewer lines, the sewage treatment plants, and sediments and flood plains in Rocky Branch Creek and Bayou Meto.

In 1971, Hercules leased the facility to Transvaal, Inc. ("Transvaal") which later became Vertac Chemical Corp.

("Vertac"). Vertac continued to manufacture 2,4-D, 2,4,5-T and 2,4,5-TP along with other chemicals. In 1974, Transvaal began storing the barrels of toluene stillbottoms above ground. Vertac continued this practice. Some of the barrels corroded over time, allowing some of the waste to leak into the ground.

In 1979, the United States Environmental Protection Agency ("EPA") restricted 2,4,5-T and its production discontinued. In 1980, the Arkansas Department of Pollution Control and Ecology ("ADPC & E") and the United States of America on behalf of the Environmental Protection Agency ("EPA") filed separate suits against Vertac and Hercules seeking civil penalties and injunctive relief to abate the continuing discharge of toxic and hazardous wastes into the surrounding area.[3] The Court granted the governments' request for preliminary injunctive relief and ordered Vertac to undertake remedial action to arrest the chemical leakage from the disposal sites. *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870 (E.D.Ark.1980).[4] Because Hercules had not been in possession or control of the plant site at the time of the lawsuit, the Court did not order Hercules to undertake any remedial actions. *Id.* at 888.

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3. The original complaint filed by the United States was brought pursuant to Section 7003 of the Resource Conservation and Recovery Act (RCRA), certain sections of the Clean Water Act and the Refuse Act.

4. The case was originally assigned to the Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas. Judge Woods recused in October, 1989, and the case was assigned to the undersigned.

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The Court subsequently approved implementation of a negotiated remedial plan to deal with containment of wastes and monitoring. *United States v. Vertac Chemical Corp.*, 588 F.Supp. 1294 (E.D.Ark.1984). Vertac ceased all operations at its plant in 1986.

The generation of wastes during the operations of the Plant was inherent or unavoidable but there is no evidence as to the amount of wastes generated from production of 2,4,-D, 2,45-T, 2,4,5-TP and other products during the operations of the Vertac plant from the 1950s until it was shut down by Vertac in 1986. When Vertac abandoned the Site in January of 1987, there were over 28,000 drums of 2,4,5-T and 2,4-D on site and 194 bulk storage tanks containing waste material, including 2,4-D, 2,4,5-T and dioxin. The waste in the drums was corroding the drums. The drums and bulk storage tanks were leaking. There was contamination in the buildings on the Site.

Vertac ceased to perform the remedial actions required by the Consent Decrees approved by the Court. Concerned with Vertac's inaction and its financial solvency in light of the sale of its assets and businesses to Inter-Ag third parties, the EPA and ADPC & E petitioned the Court to enforce the Consent Decree and appoint a Receiver. The Court appointed a Receiver, who was given full authority to handle the business affairs of Vertac.[5]

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5. The Court's Findings of Facts and Conclusions of Law regarding the petition are reported in *United States v. Vertac Chemical Corp.*, 671 F.Supp. 595 (E.D.Ark.1987). The Eighth Circuit Court of Appeals vacated the decision because Inter-Ag had not been joined as a party to the action. 855 F.2d 856 (8th Cir.1988) (Table).

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Over time, additional parties were brought in as parties engaged in the search to find all parties who might be liable for environmental harm at the Vertac Site. Cross-claims, counter-claims, third party complaints, were filed, amended and amended again or supplemented.[6]

A number of parties settled and entered into consent decrees. On October 12, 1993, the Court granted summary judgment against Hercules and in favor of the United States finding that Hercules is jointly and severally liable to the United States for costs incurred and to be incurred by the United States in the remediation of the Vertac Site, the Off-Site Areas and two municipal landfills used by Hercules to dispose of hazardous substances.[7]

Vertac stipulated that it was an owner operator and is liable under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2) for response costs at the Site areas, the Jacksonville Crane and Weatherford Residence Sites. It also stipulated that it is a liable person as described in Section

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6. In addition to the original parties in the 1980 complaint, the following are among the parties involved at one time or another, in this action: Phoenix Capital Enterprises, Inc., C.P. Bomar, Jr., J. Randal Tomblin, Inter-Ag Corporation, Velsicol Chemical Corporation, BASF Aktiengesellshaft, BASF Corporation, the United States Department of Defense, Intercapital Industries, Uniroyal Chemical Ltd., Uniroyal Chemical, Ltee-Ltd., and Standard Chlorine of Delaware.

7. The Court found that the United States was not liable under CERCLA for its role in Agent Orange production. *See* 841 F.Supp. 884.

107(a)(3) of CERCLA with regard to the Off-Site areas. Pursuant to the parties' stipulation and consent for the entry of a partial judgment of liability against Vertac, the Court found Vertac liable under Section 107(a) of CERCLA, for response costs, including interest, incurred or to be incurred by the United States at the Vertac Site, the Off-Site areas, the Jacksonville Crane Site, and the Weatherford Site, so long as those costs are not inconsistent with the NCP.[8]

The case went to trial on the remaining claims. The claims of the United States, Hercules and ADPC & E against Uniroyal and Uniroyal's claim in contribution were tried in the first phase of the trial commencing on November 3, 1993, before the Court and an advisory jury.[9] The only issue to be resolved in this proceeding was whether Uniroyal's arrangement for Vertac to manufacture a product for Uniroyal out of material supplied by Uniroyal constituted an arrangement for disposal of hazardous substances within the meaning of CERCLA, Section 107(a)(3).

The jury returned a verdict finding Uniroyal liable to the United States, the ADPC & E, and Hercules under Section 107(a)(3) for the Vertac Site and Off-Site Areas. It did not find Uniroyal liable to Hercules for contribution under Section 113 but did find Hercules liable to Uniroyal for contribution under Section 113. The jury also found "divisibility" under the jury instruction proffered by Hercules.

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8. See partial stipulation and consent for the entry of partial judgment of liability against defendant Vertac Chemical Corporation, document no. 1964.

9. Prior to the submission of the case to the jury, ADPC & E dismissed its state law claims against Uniroyal.

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Hercules also brought an action against Standard Chlorine of Delaware, Incorporated ("SCD") seeking response costs and contribution pursuant to Sections 107 and 113 of CERCLA. The jury found SCD was not liable as an arranger.

Private Party Actions Under Section 107(a)

Before proceeding to the liability of Uniroyal and SCD, two preliminary matters must be addressed. Both Uniroyal and SCD ask that the Court dismiss Hercules' cost recovery claim under Section 107(a) against them. They argue that Hercules can only bring a contribution claim under Section 113(f) against them.

The basic difference between a Section 107(a) cost recovery cause of action as opposed to a contribution action under Section 113(f) is that in the former, Hercules as a Potentially Responsible Party ("PRP") or Responsible Party ("RP") seeks to hold defendants "jointly and severally" liable for total response costs, whereas in the latter the defendant can only be held liable for its portion of the total response costs, calculated according to "such equitable factors as the court determines are appropriate." *See* 42 U.S.C. § 9613(f) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.") The courts were initially divided as to whether a RP or PRP could sue another under Section 107. See *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F.Supp. 790, 798-801 (D.N.J.1996) (discussing cases). However, every court of appeals that has examined the issue has concluded that an

action brought by a PRP is a section 113 action for contribution. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1119-20 (3rd Cir.1997).

The Eighth Circuit Court of Appeals has not addressed the issue, although one court in this district has.[10] Judge Eisele, in a well-reasoned decision, found that claims between PRPs and RPs are contribution claims governed by Section 113. *Reynolds Metals Co. v. Arkansas Power & Light Co.*, 920 F.Supp. 991, 996 (E.D.Ark.1996). The Court agrees, and need not add to the verbiage on the subject. The claims brought by Hercules against SCD and Uniroyal are contribution claims governed by Section 113, and therefore the Court will dismiss Hercules' Section 107 claims against them.

Effect of Jury Verdicts

Also to be determined is the effect of the jury verdicts. The Court empaneled a twelve-person jury who rendered the verdicts discussed above.[11] Because the Court has determined

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10. In *Wolf, Inc. v. L. & W. Service Center, Inc.*, 1997 WL 141685 (D.Neb. Mar.27, 1997), the court further discusses the state of the law, including a divergence within the district courts in the Eighth Circuit. Based on the facts of the case, the court found that the plaintiffs, as landowners who had not contributed to the hazardous condition of the site, could pursue an action under Section 107.

11. The Verdict form for the Uniroyal segment reads, in relevant part, as follows:

(Cont'd)

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(Cont'd)

(1) Do you find that Uniroyal is liable to the United States and the State of Arkansas as an arranger for the disposal of hazardous substances at the Vertac Site?

X Yes

(2) Do you find that Uniroyal is liable to the United States and the State of Arkansas as an arranger for the disposal of hazardous substances in the off-site areas?

X Yes

(3) Do you find that Uniroyal is liable to Hercules as an arranger for the disposal of hazardous substances at the Vertac Site?

X Yes

(4) Do you find that Uniroyal is liable to Hercules as an arranger for the disposal of hazardous substances in the off-site areas?

X Yes

(5) Do you find that Uniroyal is liable to Hercules on Hercules' claim for contribution?

X No

. . . . .

(6) Do you find that Hercules is liable to Uniroyal on Uniroyal's claim for contribution?

X Yes

. . . . .

(Cont'd)

that the private parties are limited to contribution claims under Section 113(f), the only claims to be brought under Section 107 are those of the United States and ADPC & E.

It is well established that because a CERCLA cost recovery action constitutes an action for restitution, which lies in equity, no right to jury trial attaches to it. *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 749 (8th Cir.1986), *cert. denied,* 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v. Mexico Feed and Seed Co. Inc.*, 729 F.Supp. 1250, 1254 (E.D.Mo.1990); *United States v. Conservation Chemical Co.*, 619 F.Supp.

(Cont'd)

> (7) Do you find that Uniroyal has established that its harm to the environment is reasonably distinguishable from the harm for which others are also liable?
>
> X Yes

The Verdict form for the Standard Chlorine segment reads, in relevant part, as follows:

> 1. We, the jury, find that Standard Chlorine is liable to Hercules for the arrangement for treatment or disposal of hazardous substances at the:
>
> (A) Vertac plant site:
>
> X No
>
> (B) Offsite Areas:
>
> X No

162, 205 (W.D.Mo.1985). *See also Hatco Corp. v. W.R. Grace & Co.-Conn.*, 59 F.3d 400, 412 (3rd Cir.1995). The parties agree that the jury verdict as to Uniroyal's liability under Section 107 is advisory.[12]

The Seventh Amendment entitles parties to a jury trial in suits at common law. U.S. Const. Amend. VII. " 'Suits at common law' refers to 'suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.' " *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564, 110 S.Ct. 1339, 1344, 108 L.Ed.2d 519 (1990) (quoting *Parsons v. Bedford*, 3 Pet. 433, 437, 7 L.Ed. 732 (1830)).

The district courts are split as to whether a right to jury trial exists in Section 113(f) contribution claims. *Compare American Cyanamid Co. v. King Industries, Inc.*, 814 F.Supp. 209, 213-215 (D.R.I.1993) (no right to jury trial in contribution action) with *United States v. Shaner*, 1992 WL 154618, at *2-4 (E.D.Pa. June 15, 1992) (right to jury trial in Section 113 action)

Only one appellate court has addressed the issue. In *Hatco Corp. v. W.R. Grace & Co. – Conn.*, 59 F.3d 400 (3rd Cir.1995), the court, after reviewing the treatment of the common-law remedy of contribution in the 18th Century, the legislative history of CERCLA as well as the statutory language, found that "an action for contribution under section

12. In *Gopher Oil Co., Inc. v. Union Oil Co.*, 955 F.2d 519 (8th Cir.1992), the trial court used an advisory jury for the claims brought under CERCLA and the state counterpart.

9613(f)(1) is essentially equitable," and that there was no right to jury trial under § 9607 or § 9613. *Id.* at 414.

This does not end the inquiry as the parties argue that the jury verdicts on the contribution claims are binding because the private parties consented to a jury trial on those claims. Federal Rule of Civil Procedure 39(c) governs requests for jury trials in cases where the parties are not entitled to a jury trial as of right. *See Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 192 (7th Cir.1994). Here, Hercules and Uniroyal requested a jury trial on the contribution claims, and SCD did not object to the request. The Court granted the request.[13]

The Court finds that the private parties have consented to a binding jury verdict on the contribution claims. See *Thompson v. Parkes*, 963 F.2d 885 (6th Cir.1992) (finding parties had consented to jury trial on equitable claim); *Bereda v. Pickering Creek Industrial Park, Inc.*,

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13. In its Order of October 7, 1993, the Court stated as follows:

> A number of parties have requested a jury trial. Other parties have objected, arguing that the parties are not entitled to a jury trial on the issues pending. The Court has reviewed the submissions and will grant the request for a jury trial. A twelve-person jury will be empaneled, and will decide those issues which are properly to be decided by the jury and will act as an advisory jury with respect to the other issues. F.R. Civ.P 39(c).

In a footnote, the Court stated that it did not need to decide, at that time, which issues should be resolved by the jury. After the trial, the Court asked the parties to address the effect of the jury verdicts.

865 F.2d 49 (3rd Cir.1989) (same). Therefore, unless the evidence does not warrant sustaining the jury verdict on the claims (see discussion *infra*) the Court will enter judgment on the jury verdicts.

Uniroyal also argues that the jury verdict as to divisibility is binding. It asserts that the verdict is, for all practical purposes, one between Hercules and Uniroyal, each of whom requested a jury trial resulting in a trial by consent. Uniroyal is incorrect in its analysis. Divisibility of harm is a defense to joint and several liability, which is imposed with a finding of liability under Section 107(a) (see discussion *infra*). As there is no right to jury trial on the Section 107(a) claim, the jury finding with respect to divisibility of harm is not binding.

Arranger Liability of Uniroyal

In 1978 and 1979, Vertac and Uniroyal entered into tolling agreements for the production of 1.3. million pounds of 2,4,5-T from 1,2,4,5-tetrachlorobenzene ("TCB"). The arrangement between Uniroyal and Vertac was for Uniroyal to send TCB to Vertac for Vertac to use to convert into 2,4,5-T and ship back to Uniroyal.

Under these agreements, Uniroyal imported the TCB to be converted by Vertac into 2,4,5-T and Uniroyal used its own agent to purchase the material in Europe. Uniroyal paid the freight to and from the Vertac facility and paid Vertac a tolling fee to process the material. Uniroyal required Vertac to meet certain product specifications for the final 2,4,5-T produced for Uniroyal. The TCB supplied by Uniroyal was the key ingredient in the process and is known as a specialty chemical.

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Uniroyal imported the TCB into the United States under a Temporary Import Bond ("TIB") to avoid the payment of duties or taxes. Each shipment of TCB had a different TIB number assigned to it, and Uniroyal paid no customs duties on any of those shipments. Instead, Uniroyal simply posted a bond in order to assure the United States Customs Office that the materials being imported would be processed and then exported within a specified period of time.

Under this bond posted by Uniroyal, Uniroyal represented to the United States Custom Service that it would have the TCB processed into 2,4,5-T by Vertac, shipped to Canada within one year, and that it was not being imported for sale or any other purpose. According to the requirements of the TIB, the entity bringing the material, that is the TCB, into the United States (in this case Uniroyal) maintains ownership of the material throughout the transaction. Therefore, at all times, the TCB supplied to Vertac by Uniroyal for Vertac's production of the 2,4,5-T for Uniroyal was owned by Uniroyal.

Vertac did not purchase the TCB from Uniroyal and Vertac's records reveal that it did not charge Uniroyal for the TCB. Vertac charged Uniroyal a tolling fee to process the TCB into 2,4,5-T, which included payment for Vertac's cost to process the TCB and the cost for additional raw materials that Vertac added to the process. The agreements also provided for waste and spillage of the TCB during processing into 2,4,5-T by requiring Uniroyal to supply 1.01 pounds of TCB for each pound of 2,4,5-T.

Vertac accounted for the TCB material as Uniroyal's material throughout the manufacturing process. Vertac kept

separate records tracking the receipt of Uniroyal's TCB, as well as separate records of its production runs of 2,4,5-T for Uniroyal. As further evidence that the TCB supplied to Vertac was Uniroyal's TCB, Uniroyal instructed Vertac to provide insurance for Uniroyal's TCB from the time the TCB arrived at the Vertac Site until the 2,4,5-T from Uniroyal's TCB was shipped back to Uniroyal.

When Uniroyal became concerned with the financial condition of Vertac, Uniroyal arranged to rent a warehouse at the Site for separate storage of its material to facilitate the segregation and to protect its material from possible seizure from creditors. As a further means of protection, Uniroyal arranged to ship only small amounts of its material to Vertac to limit its losses in the event of seizure.

As further evidence of Uniroyal's ownership of the TCB throughout the process, it took the position during a dispute with U.S. Customs concerning whether Uniroyal and Vertac had violated the terms of the T.I.B., that practically all the 2,4,5-T received from Vertac was produced principally from Uniroyal's TCB, and that all the T.I.B. TCB would have been used to make Uniroyal's 2,4,5-T. Uniroyal relied upon Vertac's accounting records which formed the basis of Uniroyal's position, and which led to the conclusion by U.S. Customs that the greater part of the 2,4,5-T acid manufactured from Uniroyal's TCB was in fact exported back to Uniroyal.

When TCB is processed into 2,4,5-T, dioxin is generated. Uniroyal knew that the processing of TCB for production of 2,4,5-T generated dioxin. Furthermore, at the time the dioxin

was generated during the production of Uniroyal's TCB into Uniroyal's 2,4,5-T, Uniroyal owned the material. Vertac removed the dioxin inherent in the production by washing trichlorophenol ("TCP"), a precursor chemical in the production of 2,4,5-T with toluene and distilling the toluene into waste "stillbottoms" which contained the dioxin. Thus, in addition to dioxin, TCB, TCP, and 2,4,5-T were generated, disposed of, and released during the processing of Uniroyal's materials.

The stillbottom wastes were stored in 55-gallon drums and placed in the north field above the plant site. Over the years, the contents of the drums leaked into the surrounding soil and were carried by the rain into the cooling pond and Off-Site Areas, including Rocky Branch Creek. The drums deteriorated and had to be placed in larger drums and moved to a more secure area for storage.

During the remaining stages of the processing of Uniroyal's material into 2,4,5-T, leaks and spills occurred throughout the system on a daily basis. The TCP holding tanks, which would have contained Uniroyal's material, also leaked. In addition to contaminating the Vertac Site, the leaks and spills also contributed to contamination of the Off-Site Areas.

The exact amount of wastes generated and disposed of as a result of the Uniroyal-Vertac agreements is not known. Vertac stored over 3,000 drums of 2,4,5-T waste in the north field, some of which contained Uniroyal's waste.

The Remedial Investigation/Feasibility Study ("RI/FS") reports conducted for the Vertac Site indicate the presence

of dioxin, 2,4,5-T, 2,4,5-TP, TCB, TCP, 2,4-D, among other hazardous substances in the surface soils, below surface soils, the sewer lines beneath the plant site, the buildings, equipment, tanks, pipes, vessels and the groundwater. The RI/FS reports also indicate that the groundwater contains a number of contaminants such as 2,4,5-T, 2,4-D, dioxin, toluene, and methanol. The RI/FS for the Off-Site Areas indicates the presence of dioxin in significant quantities in the Rocky Branch flood plains, the sewer lines, and the sewage treatment plants. These contaminants result from the years of operation of the Vertac plant.

When Vertac abandoned the Site in January of 1987, there were over 28,000 drums of 2,4,5-T and 2,4-D stillbottom wastes at the Vertac Site and 194 bulk storage tanks. Some of these drums and tanks contained dioxin contaminated waste from the production of Uniroyal's 2,4,5-T. Testing of the drums reveals that there has been almost total commingling and cross-contamination of waste materials in the drums.

Although Vertac discontinued the production of 2,4,5-T in 1979, it continued to use the equipment until December, 1986, for the production of materials which did not generate dioxin. The equipment is contaminated with dioxin. The dioxin, TCB, TCP, and 2,4,5-T generated by Hercules and Vertac, including that generated for Uniroyal, are chemically indistinguishable and commingled in the soil, sediments, flood plains, sewer lines, drums, and equipment. All are hazardous substances within the meaning of CERCLA.

Appendix B

At the time of trial, about 15,000 drums of wastes, as well as contaminated equipment, soil and sediments remained at the Site. The 2,4,5-T drums are among those remaining. The evidence, therefore, shows that there have been releases of hazardous substances at the Vertac Site and that there is a continuing threat of release of hazardous substances at the Site. The United States, ADPC & E and Hercules have incurred response costs in treating the releases and threats of release.

Liability Under Section 107(a)(3)

In order to prove liability, the plaintiffs must show that Uniroyal is an arranger; that a release or threatened release from a facility has occurred; that the plaintiffs have incurred response costs as a result; and that the costs were necessary and consistent with the national contingency plan. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 (8th Cir.1995).

There is no dispute that the Vertac Site is a facility within the meaning of CERCLA. The dioxin, TCP, TCB, and 2,4,5-T generated during the production process are hazardous substances within the meaning of CERCLA. The evidence further shows that there have been releases of hazardous substances at the Vertac Site and that there is a continuing threat of release of hazardous substances at the Site. The plaintiffs have incurred response costs in treating the releases and threats of release.

Uniroyal asserts that the jury was not instructed correctly, and therefore its finding of liability is erroneous.

It argues that continuous and exclusive ownership of the raw materials, the work in process, and the finished product are required for arranger liability, and that plaintiffs have not met their burden of proving these elements.[14] Because the jury verdict is advisory as to arranger liability under Section 107, the Court must make its own findings of fact and conclusions of law based on the evidence.[15]

The phrase "arranged for" is not defined in the statute.[16] "Congress has left this task to the courts, and the courts have

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14. With respect to Uniroyal's liability as an arranger, the jury was instructed:

> When two companies enter into an arrangement whereby one company which owns the raw materials furnishes those raw materials to another company to be further processed into a product to be returned to the company furnishing the raw materials, and the generation of waste is inherent in that further process, that arrangement is an arrangement for disposal by the furnishing party under CERCLA. If you find from the evidence that the arrangement between Uniroyal and Vertac is an arrangement such as I have just described, you should find that the arrangement was an arrangement for disposal by Uniroyal.

15. Because the jury verdict was advisory with respect to liability under Section 107(a)(3), the correctness of the jury instruction given is not relevant. Thus, even assuming Uniroyal advances a meritorious argument that the jury instruction is incorrect in that it did not include all the elements of arranger liability as set forth in *Aceto,* the Court in its own analysis finds Uniroyal liable as an arranger. *See* factual findings, *supra* and conclusions, *infra.*

16. Section 107(a)(3) of CERCLA defines an arranger as:

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at times struggled with the contours of 'arranger' liability under § 107(a)(3)." *South Florida Water Management Dist. v. Montalvo,* 84 F.3d 402, 406 (11th Cir.1996).

The Eighth Circuit has given a liberal interpretation to "arranger" liability, given CERCLA's " 'overwhelmingly remedial scheme.' " *United States v. Aceto Agricultural Chemicals Corp.,* 872 F.2d 1373, 1381 (8th Cir.1989) (citations omitted).[17]

(Cont'd)

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

42 U.S.C. § 9607(a)(3).

17. The court in *Mathews v. Dow Chemical* Co., 947 F.Supp. 1517 (D.Colo.1996) discussed interpretation of arranger liability by the Eighth, Eleventh and Seventh Circuits. The court noted that the Eighth Circuit in *Aceto* "provides the most liberal interpretation of 'arranged for.' " *Id.* at 1523. *See also South Florida Water Management Dist. v. Montalvo,* 84 F.3d 402, 407, 408 n. 9 (11th Cir.1996) (case-by-case analysis, focusing on factors such as party's knowledge of disposal, ownership of the hazardous substances, and intent; refuses "wholesale adoption of *Aceto*" as law of the circuit).

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Aceto remains the leading authority in this Circuit on arranger liability. In that case, pesticide manufacturers hired a formulating company to mix and package pesticides for them. The complaint alleged that the manufacturers owned the technical grade pesticide alleged to be a "hazardous substance" under CERCLA, the work in process and the resulting product. "[T]hat is, the defendant retained ownership of its pesticide throughout the formulation and packaging process." *Id.* at 1378. The complaint further alleged that the generation of wastes was inherent in the formulation process and that wastes were in fact generated and disposed of at the site. The court found that the complaint alleged sufficient facts to hold that the pesticide manufacturers had arranged for the disposal of hazardous wastes. Evidence of actual control was not necessary for arranger liability if ownership issues were otherwise established. *Id.* at 1375-1382. Furthermore, proof of specific intent to arrange for the disposal of hazardous substances is not required. *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1088 (8th Cir.1995), *cert. denied,* 519 U.S. 808, 117 S.Ct. 50, 136 L.Ed.2d 14 (1996).

The Court concludes that the evidence establishes that Uniroyal owned the TCB it supplied to Vertac for processing into 2,4,5-T, that Uniroyal retained an ownership interest in its material during the processing stage, that Uniroyal owned the 2,4,5-T that was returned, that the generation of hazardous substances was inherent during the processing of Uniroyal's material, and that the processing by Vertac resulted in the release of hazardous substances. Thus Uniroyal is liable as an arranger under CERCLA. 42 U.S.C. § 9607(a)(3).

Appendix B

Liability Under Section 113

As noted above, the jury found that Uniroyal was not liable to Hercules for contribution under Section 113(f), while Hercules was liable to Uniroyal for contribution.[18]

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18. On the issue of Uniroyal's contribution to Hercules the jury was instructed:

> Previously in this case, this Court determined as a matter of law that Hercules is a party liable for clean-up costs at the Jacksonville site and offsite areas. Under CERCLA, any liable party or any party which has paid response costs may seek contribution from any other party who is liable or potentially liable under CERCLA. Hercules has brought such a contribution claim against Uniroyal in this case.
>
> To establish a valid claim for contribution under CERCLA § 113, you must first find that Uniroyal is liable to the United states government or the state of Arkansas as an arranger for the disposal of hazardous substances as you were instructed earlier. In addition to the elements of arranger liability, Hercules must also establish the following elements by a preponderance of the evidence:
>
> > (1) that Uniroyal's actions caused contamination at the Jacksonville site and offsite areas; and
> >
> > (2) that Hercules incurred response costs as a result of the contamination caused by Uniroyal.
>
> If Hercules fails to prove either of the above elements by a preponderance of the evidence, then you must find that Uniroyal is not liable to Hercules under this claim.

Appendix B

Hercules asks that the Court enter judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.

In ruling on a motion for judgment as a matter of law after trial, the Court must view the evidence in the light most favorable to the prevailing party and must not engage in weighing or evaluating the evidence or considering questions of credibility. Judgment as a matter of law "is appropriate only when all the evidence points one way and is 'susceptible of no reasonable inference sustaining the position of the nonmoving party.' " *Commercial Property Investments. Inc. v. Quality Inns Int. 'l. Inc.*, 61 F.3d 639, 644 (8th Cir.1995) (citation omitted).

Uniroyal argues that the jury finding can stand, as contribution requires a finding of causation of contamination. *Farmland Industries. Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1342 n. 6 (8th Cir.1993). *See also Control Data*, 53 F.3d at 935 (focus during contribution on harm each party causes the environment; liable party responsible for its share of all response costs not just those "caused" by its release); *Elf Atochem North America, Inc. v. United States*, 833 F.Supp. 488, 494 (E.D.Pa.1993) (Eighth Circuit in *Farmland* found that proper focus is causation of contaminants at site, not the causation of response costs).

As found above, Uniroyal is liable as an arranger under Section 107(a)(3) of CERCLA. The jury verdict as to contribution would only have merit if Uniroyal's hazardous substances caused a release or threat of release without causing contamination. The evidence, however, is conclusive

that during the processing of the TCB on behalf of Uniroyal to make the 2,4,5-T, hazardous substances, including dioxin, were generated, and that these were disposed of at the Site and Off-Site Areas. Furthermore, Uniroyal's hazardous substances did, indeed, cause contamination at the Site. The Court must, therefore, find that there is insufficient evidence to sustain the jury's verdict regarding Uniroyal's liability for contribution and that Hercules is entitled to judgment as a matter of law on its claim for contribution against Uniroyal. Thus, Uniroyal is liable for its share, as determined by Section 113(f), of all response costs. *Control Data,* 53 F.3d at 936.

While asserting that the jury verdict finding Uniroyal not liable for contribution cannot be sustained, Hercules then argues that there is no evidence to support the jury's verdict finding it liable for contribution.[19] The argument, of course,

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19. The jury instruction concerning Uniroyal's Section 113 claim against Hercules reads as follows:

> Previously in this case, this Court determined as a matter of law that Hercules was jointly and severally liable for clean-up costs at the Jacksonville site and offsite areas.
>
> Under CERCLA, any liable party or any party which has paid response costs may seek contribution from any other party who is liable or potentially liable under CERCLA. If you first find Uniroyal liable under CERCLA, Uniroyal then makes such a contribution claim against Hercules in this case, for response costs Uniroyal will be required to pay in the future.

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is without merit. The Court has already found Hercules jointly and severally liable under Section 107.[20] There is no doubt that Hercules caused contamination at the Site during its years of operation there. Thus, judgment will be entered in favor of Uniroyal on its Section 113 claim against Hercules.

Divisibility of Harm

As stated above, divisibility of harm is a defense to joint and several liability. Thus, a defendant will not be held jointly

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> Because this Court has already determined as a matter of law that Hercules is jointly and severally liable for response costs at the Jacksonville site and off-site areas, Uniroyal must establish only one additional element to prove a valid claim for contribution under CERCLA § 113. Uniroyal must establish the following element by a preponderance of the evidence:
>
> > that Hercules' actions caused contamination at the Jacksonville site and offsite areas.
>
> If Uniroyal fails to prove this element by a preponderance of the evidence, then you must find that Hercules is not liable to Uniroyal under this claim.

20. Indeed, Hercules argues in its proposed conclusions that a finding of liability under Section 107(a) is the only prerequisite to liability for contribution under CERCLA Section 113(f), and therefore Uniroyal is liable to Hercules. Hercules' argument with respect to Uniroyal contradicts its assertion that the jury's verdict finding Hercules liable for contribution cannot be sustained.

and severally liable to a governmental or non-liable private plaintiff "where the defendant can demonstrate that the harm at a given site is 'divisible,' i.e., there are distinct harms or a reasonable basis for determining the contribution of each cause to a single harm." *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1513 (11th Cir.1996).

In response to a special interrogatory the jury found that Uniroyal had established "that its harm to the environment is reasonable distinguishable from the harm for which others are also liable."[21] As discussed above, the jury finding on

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21. With respect to divisibility of harm, the jury was instructed:

> If following these instructions, you find that Uniroyal arranged for disposal of hazardous substances at Vertac, even though others also contributed to the release of hazardous substances, you must find that Uniroyal is liable to the Untied States and the State of Arkansas for the entire amount of the United States' and the State of Arkansas' costs. This liability is what the law calls joint and several liability. It means that a plaintiff can recover the entire damages from any individual defendant, though it cannot, of course, recover that amount more than once.
>
> This joint and several liability applies even if the defendants acted at different times, or even when other parties, not now before the Court, contributed also.
>
> The law also recognizes a defense to joint and several liability — divisibility of harm. When two or more parties are liable under CERCLA for harm to the

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this issue is advisory and therefore the Court is not bound by the jury's determination.

The burden is on Uniroyal to demonstrate that there is a reasonable basis for determining the contribution of each cause to a single harm. *United States v. Colorado & Eastern R. Co.*, 50 F.3d 1530, 1535 (10th Cir.1995). The burden on Uniroyal is substantial and the analysis is "factually complex." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3rd Cir.1992) (*"Alcan-Butler"*) *See Control Data*, 53 F.3d at 934 n. 4 ("Once liability is proved, all of the defendants are jointly and severally liable, unless *a particular defendant can establish that his harm is divisible, very difficult proposition."*) (emphasis added).

(Cont'd)

environment, and one of those parties claims that it should be liable only for the harm to the environment that is attributable to it, then the burden of showing how the harm of that one party can be distinguished from the harm of the others is upon the party seeking to so limit its liability.

Accordingly, if you find that Uniroyal is liable under the other instructions given to you, then Uniroyal will have the burden of proving to you that the harm to the environment for which it is liable is reasonably distinguishable from the harm for which others are also liable.

If Uniroyal does not prove this distinction to your satisfaction, then Uniroyal would be jointly and severally liable with others who might also be liable for the environmental harm at the sites in issue in this action.

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Uniroyal relies on production capacity at the Site during its years of operation or the number of barrels of waste existing at the Site prior to incineration as bases for determining divisibility. While Uniroyal attempted to provide evidence that the hazardous substances generated from Vertac's production of 2,4,5-T for Uniroyal were only a small amount of the total hazardous substances disposed of at the Site and Off-Site areas, those hazardous substances are indistinguishable, and commingled with, other hazardous substances at the Site.[22] Indeed, Uniroyal argued in its defense that its raw material and finished product were commingled with other raw material and finished product at the Vertac Site, so that it could not have retained any ownership interest. However, if these products were commingled, by Uniroyal's own admissions, then it would follow that some of the hazardous substances generated from the production of that material were also commingled.

Uniroyal's reliance on volumetric evidence is insufficient in this instance to meet its burden. Where, as in this case, hazardous substances are commingled, a defendant cannot rely on merely volumetric evidence. Evidence must be produced "disclosing the individual and interactive qualities of the substances deposited" at the Site. *United States v. Monsanto Co.,* 858 F.2d 160, 172 (4th Cir.1988), *cert. denied,* 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). This includes proof of the "relative toxicity, migratory potential and synergistic capacity" of the various

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22. The volume or quantity of wastes produced during production of Uniroyal's 2,4,5-T may be relevant in allocating response costs under Section 113(f). *See Redwing Carriers,* 94 F.3d at 1514 n. 32.

substances present. *Id.* at 172 n. 26. *See also Alcan-Butler,* 964 F.2d at 269 (analysis of divisibility of harm factually complex "as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue.") *But see Matter of Bell Petroleum Services. Inc.,* 3 F.3d 889, 903-904 (5th Cir.1993) (defendant met burden of proving reasonable basis for apportioning liability on volumetric basis where only one hazardous substance, and no synergistic effects).

Uniroyal did not call any expert witnesses to discuss the relative toxicity, migratory potential or synergistic effects of the commingled hazardous substances at the Site. It disregards hazardous substances, beside dioxin, that were produced during the manufacture of Uniroyal's 2,4,5-T. Uniroyal's reliance on the number of drums as a basis for divisibility ignores evidence of leakage, cross-contamination and commingling. There is no evidence "showing a relationship between waste volume, the release of hazardous substances and the harm at the site." *Monsanto,* 858 F.2d at 172.

In sum, Uniroyal has failed to present sufficient evidence to allow the Court to apportion the harm. Finding that Uniroyal has failed to prove divisibility of harm, the Court finds that Uniroyal's liability is joint and several.

Hercules' Claims against SCD

The second segment of the liability trial involved the third party claim by Hercules against SCD.[23] Hercules' claim

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23. As discussed above, Hercules' Section 107 claim against SCD is dismissed.

arises from SCD's sale of mixed TCBs, also known as trichlorobenzene still bottoms or polychlors, to Transvaal, Inc., Vertac's predecessor in interest (hereinafter referred to as "Vertac"). Hercules contends that SCD's sale of these polychlors to Vertac constituted an arrangement for disposal or treatment of a hazardous substance and SCD is a liable party under § 107(a)(3) of CERCLA, which imposes arranger liability. Hercules seeks contribution under Section 113 for SCD's share of Hercules' liability to the United States under previous orders of the Court.

A detailed analysis of the transaction is necessary to determine whether it was in fact a sale or an arrangement for disposal of a hazardous substance. *See United States v. Petersen Sand and Gravel, Inc.*, 806 F.Supp. 1346, 1354 (N.D.Ill.1992) (No bright line between a sale and a disposal under CERCLA; party's responsibility under Section 107(a)(3) must turn on fact-specific inquiry into nature of transaction). Because of the nature of the transaction, some discussion of the chemical reactions involved is necessary.

From around November 1971 through April 1979, Vertac manufactured 2,4,5-T at the Jacksonville plant. 1,2,4,5-tetrachlorobenzene ("1,2,4,5-TCB") was an essential raw material for Vertac's manufacture of 2,4,5-T. Until the end of 1973, Vertac purchased 1,2,4,5-TCB primarily from Hooker Chemical.

In 1973, Vertac learned that Hooker planned to discontinue sales of 1,2,4,5-TCB at the end of the year. Vertac then began looking for alternate supplies of 1,2,4,5-TCB so that it could continue manufacturing 2,4,5-T.

Appendix B

SCD is a manufacturer of a range of chemical intermediates known as chlorinated benzenes, made by reacting chlorine gas and benzene together. During this reaction, isomers and chlorinated benzene compounds are created, including monochlorobenzene ("MCB"), dichlorobenzene, trichlorobenzene ("tri"), and tetrachlorobenzene ("TCB"). In the production of chlorobenzenes, it is impossible to produce a particular chlorinated benzene compound or isomer to the exclusion of others.

During the production process, chlorine and benzene were reacted together, and the chlorinated mass was then moved to a series of distillation columns. In the first distillation column, the first product separated out was MCB, and it was placed into a storage tank pending shipment to SCD's customers.

The remaining material, consisting of paradichlorobenzene ("PDCB"), orthodichlorobenzene ("ODCB"), and Tris moved from the bottom of the MCB distillation column into a series of two columns. PDCB was removed from the top of the first of the two columns. It was placed into a different storage tank pending shipment to SCD's customers. ODCB was distilled off the top of the second column, and placed in a third storage tank.

The remaining materials were a mixture of Tris referred to as "crude trichlorobenzene." These materials were shipped to SCD's plant in New Jersey for further processing.

In what SCD asserts is "product balance," SCD states that it was essential to its economic success to sell each of

the chlorinated benzene compounds or isomers that was produced during the chemical reactions. It therefore began to search for new markets for each of its products, looking particularly to major chemical companies.

In 1972, Dupont approached SCD to supply a large requirement of ODCB for Dupont's use in the manufacture of herbicides. SCD, however, could not make ODCB exclusively. For each pound of ODCB, SCD also made 1 1/2 to 2 pounds of PDCB and three pounds of MCB. SCD agreed to produce the ODCB for Dupont and actively sought out new customers for the surplus PDCB that was produced in conjunction with the ODCB.

In 1972, SCD became aware that Velsicol Chemical Company ("Velsicol") needed 1,2,4 tri for use in the manufacture of herbicides. SCD entered into a contract with Velsicol for the sale of 1,2,4 tri. At the same time, SCD developed a process to make the 1,2,4 tri by chlorinating the PDCB, and it was therefore able to use the excess PDCB as a raw material in the production of 1,2,4 tri for Velsicol.

The contract between Velsicol and SCD covered the period from January 1, 1973 through December 31, 1978. The contract, containing a technical specification for 99% pure 1,2,4 tri, was a requirements contact whereby, SCD would supply 75 percent of Velsicol's requirement up to a maximum of 30 million pounds of 1,2,4 tri per year. The base price of the 1,2,4 tri was set at 11.5 cents per pound, but the agreement included a volume discount whereby the price of the materials decreased if Velsicol met certain quantity requirements under the contract. The agreement also

provided a formula for SCD to adjust the price of the materials sold to Velsicol if there were changes in the price of SCD's raw materials or changes in the Consumer Price Index ("CPI").

It is impossible to produce 1,2,4 tri exclusively. In manufacturing this material for Velsicol, SCD would also be producing mixed TCBs.[24] In pricing the 1,2,4 tri to Velsicol, SCD assumed that it would be able to sell the TCB produced in conjunction with the 1,2,4 tri at a price that would at least cover its raw material and energy costs.

In 1973, Vertac became aware that SCD had a mixture of TCB available. In August of 1973 Vertac and SCD entered into a contract for the sale of polychlors. The terms of the contract covered a five-year period from January 1974 through December 1978. The material to be supplied would contain a maximum of 5 percent trichlorobenzene ("Tris"), 61 to 67 percent 1,2,4,5-TCB, 30 to 33 percent 1,2,3,4-TCB, 4 percent maximum pentachlorobenzene and trace amounts of hexachlorobenzene. The contract between SCD and Vertac was a requirements contract, whereby SCD would supply

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24. In 1972, SCD constructed a plant to produce 1,2,4 tri. Ninety-eight percent pure PDCB was reacted with chlorine and fed into a distillation column, where the unreacted PDCB was taken from the top of the column and fed back into the reactor. The bottom of the column contained a mixture consisting primarily of 1,2,4 tri and mixed TCBs. This mixture was fed into another distillation column, where the 1,2,4 tri was boiled off the top of the column and the mixed TCBs, consisting primarily of 1,2,3,4 TCB and 1,2,4,5 TCB were taken from the bottom of the column. The mixed TCBS are sometimes referred to as "trichlorobenzene still bottoms" or "polychlors."

90 percent of Vertac's requirements of the polychlors up to a maximum of 10 million pounds per year.

The contract provided a volume discount. If Vertac purchased more than 6 million pounds, it received a one-half cent per pound discount; if it purchased over 8 million pounds, it received a one cent per pound discount. The base price was set at 11 cents per pound; however, the contract provided a formula whereby SCD could adjust the price of the materials sold to Vertac if there were changes in the price of SCD's raw materials or changes in the CPI. The purpose of this provision was to protect SCD's profit margin in the event of significant increases in its raw material costs.

SCD determined the base price of 11 cents per pound after taking into account the raw material values, energy and labor costs, overhead and amortization of plant and equipment, and profit margin, and thereafter discussing the price with Vertac.

Vertac could not use SCD's material without processing it further to remove the 1,2,4,5-TCB it needed from the other materials. Vertac had to build a separate facility, referred to as the "benzene plant," for separating 1,2,4,5-TCB from the polychlor material.

After the separation, Vertac was left with a residue that contained, primarily, 1,2,3,4-TCB, plus some 1,2,4,5-TCB, 1,2,4-trichlorobenzene, pentachlorobenzene, and other impurities. In Vertac's processing of the polychlors, various drips, leaks and spills occurred during the separation and handling of the 1,2,3,4-TCB residue. Spills of the

1,2,3,4-TCB residue ultimately went to the equalization basin and was discharged to the Jacksonville sewage treatment plant.

Vertac had no use for the residue. However, Vertac intended to sell the 1,2,3,4 residue. SCD advised Vertac that Olin Chemical Company ("Olin") was a potential purchaser of the residue. Vertac ultimately was able to sell virtually all of the 1,2,3,4 residue to Olin for further processing and use.

During the course of dealing between SCD and Vertac, SCD frequently invoked the price escalation clause due to frequent fluctuations in the CPI and the prices for benzene and chlorine from 1974 through 1976.

After purchasing over 6 million pounds of polychlors in the first year of the contract, Vertac notified SCD that it would need 10 million pounds of polychlors the next year, an amount in excess of SCD's ability to produce the polychlors in its normal production process. As a result, SCD and Vertac negotiated a 7.5 cent premium on the polychlors, effective January 1, 1975. The premium reflected SCD's additional production costs for chlorinating additional PDCB to produce more polychlors.

In January, 1975, Vertac requested relief from the 30-day payment term included in its contract. SCD agreed to allow Vertac extended payment terms, where Vertac would be allowed to pay on invoices in 90 days, but only on the condition that Vertac pay the cost of financing the extended term at 1 percent per month.

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In March, 1975, Vertac requested a reduction in the price of polychlors to 16 cents per pound due to a decline in business. At the time, polychlors were selling for approximately 25 cents per pound. SCD refused to agree to the price reduction because SCD would not have been able to make a profit at the lower rate.

In 1976, SCD began supplying Vertac with pure 1,2,4,5-TCB in addition to the polychlors. Like Vertac, SCD sold the 1,2,3,4 residue remaining after the separation to Olin.

Vertac stopped buying the polychlors from SCD in April of 1977. Vertac's last purchase of pure 1,2,4,5-TCB from SCD was in December, 1978. The EPA ban of 2,4,5-T in 1979 basically eliminated the commercial demand for TCB.

Inspections at the Site and Offsite reveal the presence of tetrachlorobenzene, pentachlorobenzene, hexachlorobenzene and trichlorobenzenes at the Site and Offsite areas. The 1,2,4,5-TCB, 1,2,4-tri, hexachlorobenzene, pentachlorobenzene, and the distillation or fractionation column bottoms from the production of chlorobenzenes are all classified as hazardous substances under CERCLA. 40 C.F.R. § 302.4 (Table). The polychlors that came from SCD were the source of these hazardous substances.

SCD contends that it was selling a useful product. Hercules, however, argues that the "useful product" defense does not extend to the limits asserted by SCD.

The jury found that SCD was not liable to Hercules for the arrangement for treatment or disposal of hazardous

substances at the Plant Site or Offsite areas.[25] Because it did not find SCD liable as an arranger, it did not address the issue of Hercules' claim for contribution.

SCD argues that the jury's finding that SCD was not liable as an arranger is binding on the Court on the question of SCD's liability to Hercules. That is, SCD correctly argues that a plaintiff cannot succeed under a Section 113(f)(1) unless it first establishes that the defendant is a liable party under Section 107. Thus, the jury's finding that SCD is not

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25. With regard to Hercules' claim against SCD, the jury instruction read as follows:

> The mere sale of a product does not amount to an arrangement for disposal or treatment. For instance, where a new and useful substance is sold to another, who then incorporates it into a product or manufacturing process, there is no arrangement for disposal or treatment. On the other hand, where there is a sale of a substance merely to get rid of it or where the sale is a sham for disposal, the seller may be found liable. Thus, if you find by the preponderance of the evidence that Standard Chlorine's sales to Vertac were of a new and useful substance that Vertac incorporated into a product or manufacturing process, then you should find that Standard Chlorine did not arrange for disposal or treatment and is, therefore, not liable. If on the other hand, you find by a preponderance of the evidence that Standard Chlorine sold its polychlors also known as trichlorobenzene stillbottoms to Vertac merely to get rid of them or that these sales were really a sham for disposal, then you should find that Standard Chlorine did arrange for disposal or treatment.

liable as an arranger under Section 107(a)(3) constitutes a resolution of SCD's Section 113 liability.[26]

SCD then argues that the jury's finding binds the Court's determination of Hercules' Section 107 claim. That argument, however, conflicts with SCD's position that the contribution claim can only be brought under Section 113 and that Hercules' Section 107 claim should be dismissed.

The issue is confusing, but can be reconciled. A finding that SCD is a liable party under Section 107 is a necessary element to a contribution claim. The Court need not, at this time, decide whether that determination should be made by the Court as a matter of law or can be left to a jury.[27] It is

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26. "When legal and equitable claims are tried together, the right to a jury in the legal action encompasses issues common to both." *Lincoln v. Board of Regents of Univ. System of Georgia,* 697 F.2d 928, 934 (11th Cir.1983), *cert. denied,* 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983). "Thus, to the extent that the legal and equitable issues overlap, the jury's verdict on the legal claim operates as a finding of fact binding on the Court in its disposition of the accompanying equitable claim." *Dasler v. E.F. Hutton & Co., Inc.,* 694 F.Supp. 624, 627 (D.Minn.1988). *See also McIntosh v. Weinberger,* 810 F.2d 1411, 1429 (8th Cir.1987), *vacated on other grounds sub nom. Turner v. McIntosh,* 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898 (1988); *Gibson v. Mohawk Rubber Co.,* 695 F.2d 1093, 1101 (8th Cir.1982).

27. Given that the parties consented to a jury trial on the contribution claim, and that liability as an arranger is a necessary element of that claim, the Court is of the opinion that the jury finding is binding. *See Control Data,* 53 F.3d at 934 (recovery of response costs requires a plaintiff to initially prove that a defendant is liable under CERCLA).

clear that whether the Court views the jury finding as binding or merely advisory the evidence supports the conclusion that SCD is not liable.

"The sale of a useful, although hazardous substance, to serve a particular purpose, is not an arrangement for disposal and will not impose CERCLA liability." *Douglas County. Neb. v. Gould, Inc.*, 871 F.Supp. 1242, 1245 (D.Neb.1994). "If a party merely sells a product, without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance, CERCLA liability would not be imposed." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir.1990).

However, merely characterizing a transaction as a sale does not preclude a finding of liability. If the transaction is really a sham for disposal, CERCLA liability will attach. *Douglas County*, 871 F.Supp. at 1245. The essential inquiry, therefore, is whether SCD, by selling the polychlors to Vertac, arranged to "get rid of" hazardous substances.[28]

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28. SCD, relying on a recent Sixth Circuit case, states that the plaintiff must prove that a defendant entered the transaction with the intent of arranging for the disposal or treatment of a hazardous substance. *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231 (6th Cir.1996) ("We conclude that the requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances. The intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances.") *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir.1993), *cert. denied*, 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994) ("arranged for" implies intentional action); *See also Ekotek Site PRP Committee v. Self,* (Cont'd)

Appendix B

Hercules argues that the polychlors were not a primary business product. The still bottom mixture, according to Hercules, was nothing more than a "by-product" of SCD's production process. It further contends that the by-product material was not useful in its existing state; rather Vertac had to refine the material further to obtain the product it needed. In addition, Hercules argues that there was no effective market for the material; that SCD could not sell it to anyone other than Vertac.

The record establishes that the transaction involved the sale of a useful product. SCD sold Vertac a legitimate,

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(Cont'd)
932 F.Supp. 1328, 1336 (D.Utah 1996) (concludes that Tenth Circuit would follow approach of Seventh and Eleventh Circuits and require intentional action before arranger liability attaches)

The Eleventh Circuit, however, rejected any attempt to substitute a *per se* rule for the phrase "arranged for." Rather, intent is a relevant, but not necessarily dispositive factor, in the determination of whether there has been an "arrangement" for disposal. *Montalvo,* 84 F.3d at 407. *See also Redwing Carriers,* 94 F.3d at 1512 (plaintiff need not demonstrate a party acted with specific intent to dispose of hazardous substances).

The Eighth Circuit has rejected the argument that Section 107(a)(3) contains a specific intent requirement. *TIC Investment,* 68 F.3d at 1087-88. Thus, it is unlikely that the Eighth Circuit would require Hercules to prove that SCD intended to dispose of the waste in order to establish arranger liability. Nevertheless, assuming an intent requirement, it is clear from the totality of the circumstances surrounding the transaction that SCD did not intend to dispose of a hazardous substance.

technical grade chemical product for use as a raw material in Vertac's manufacturing operations. That the product required further processing before it could be put to its intended use is a common occurrence in the chemical industry. Indeed, a technical grade product is one that requires some further processing before it can be put to its intended use.

It was typical of the chlorinated benzene market for a company to have a few customers for a particular product. Thus, Vertac was SCD's only customer for the polychlors. Similarly, Velsicol was SCD's only customer for the 1,2,4 tri. SCD had two or three customers for the ODCB, and seven or eight customers for MCB.

SCD's sale to Vertac was conducted at a substantial profit for SCD, and the contract for sale of polychlors contained terms similar to those contained in sales contracts SCD had for other products.

"[T]he sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal . . ." *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 54 F.3d 379, 384 (7th Cir.1995) (citations omitted). The Court is not persuaded that SCD was attempting to get rid of a by-product for which it had no use. Thus, the transaction between Vertac and SCD is distinguishable from those in the cases relied upon by Hercules. *See e.g., Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir.1994) (sale of spent lead acid batteries to a reclaimer who removed the lead plates prior to discarding the battery casing constituted

arrangement for disposal); *State of California v. Summer Del Caribe,* 821 F.Supp. 574 (N.D.Cal.1993) (sale of solder dross, a by-product from the manufacture of cans, from which solder could be reclaimed after additional processing, constituted an arrangement for disposal). Furthermore, unlike the contaminated styrene in *Cadillac Fairview/California. Inc. v. United States,* 41 F.3d 562 (9th Cir.1994) or the used motor oil in *Ekotek PRP Committee v. Self,* 881 F.Supp. 1516 (D.Utah 1995), the polychlors sold by SCD were not waste produced as a result of prior uses of the materials for their intended purpose and they had substantial economic value in the state in which they were sold.

The evidence establishes that SCD's manufacturing process produced a number of chemically-distinct chlorinated benzenes, each of which was fit for particular industrial uses. SCD attempted to sell every chlorinated benzene it produced at profit margins sufficient to render profitable the entire manufacturing operation.

The Court will not extend CERCLA liability to SCD which sold a hazardous, but useful product to Vertac for its original use as raw material in Vertac's manufacturing operation of 2,4,5-T. *See Gould,* 871 F.Supp. at 1247 (CERCLA liability will not attach if a transaction involves the sale of a new useful product as opposed to the sale of a substance merely to get rid of it.)

Thus, the Court finds that SCD is not liable as an arranger and therefore Hercules' Section 113(f) claim for contribution against SCD must be dismissed.

Appendix B

SUMMARY

In sum, the Court finds that Uniroyal is liable as an arranger under Section 107(a)(3). Thus, judgment will be entered finding Uniroyal jointly and severally liable to the United States and the ADPC & E under Section 107(a)(3) of CERCLA and liable in contribution to Hercules under Section 113(f) of CERCLA, and Hercules liable in contribution to Uniroyal under Section 113(f) of CERCLA. Hercules' claims against SCD are dismissed with prejudice.

The Court notes that allocation of response costs according to equitable principles remains. The parties are directed to file reports within twenty days setting forth proposed case management plans for the allocation phase.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED JUNE 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3684/85/00-1473

Unied States of America, et al.

Appellees,

v.

Hercules, Inc.,

Appellant.

Order Denying Petition for Rehearing En Banc

The petition for rehearing en banc is denied.

(5128-010199)

June 6, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
NOV 5 2001

No. 01-387

In the Supreme Court of the United States

CROMPTON CO./CIE, FKA UNIROYAL CHEMICAL LIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the disposal of hazardous substances. Section 107(a)(3) of CERCLA provides that "any person who by contract, agreement, or otherwise arranged for disposal * * * of hazardous substances owned or possessed by such person," shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(3). The question presented is:

Whether a corporation that arranged with an herbicide manufacturer to process the corporation's 1,2,4,5-tetrachlorobenzene (TCB) into the herbicide 2,4,5-T was properly found to have "arranged for disposal" within the meaning of Section 107(a)(3), where the corporation supplied the TCB to the manufacturer and retained ownership throughout the manufacturing process and where generation of hazardous wastes requiring disposal was an inherent and expected part of the manufacturing process.

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 247 F.3d 706. The memorandum opinion and order of the district court (Pet. App. 30a-75a) is reported at 966 F. Supp. 1491.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. A petition for rehearing was denied on June 6, 2001 (Pet. App. 76a). The petition for a writ of certiorari was filed on September 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's cleanup expenses from the responsible parties. The United States brought this CERCLA action against petitioner Uniroyal Chemical Limited, and other parties, including Hercules, Inc. (Hercules) and Vertac Chemical Corporation (Vertac), to recover the government's costs of responding to a release of hazardous substances at an herbicide manufacturing plant in Jacksonville, Arkansas. In a series of rulings, the United States District Court for the Eastern District of Arkansas concluded, *inter alia*, that petitioner and Hercules are jointly and severally liable to the United States for cleanup costs. Pet. App. 75a. The court of appeals affirmed the judgment insofar as it held that petitioner is a jointly and severally liable party within the meaning of CERCLA, Section 107(a)(3), 42 U.S.C. 9607(a)(3), (extending liability to those who "arranged for disposal of * * * hazardous substances"), but reversed the judgment of joint and several liability against Hercules. *Id.* at 29a. The court of appeals vacated the judgments regarding recoverability of the government's costs and contribution between the liable parties, so that they could be "revisited by the district court following further proceedings consistent with this opinion." *Ibid.*

1. CERCLA establishes a uniform framework for addressing the problem of inactive hazardous-waste sites throughout the United States. "CERCLA both provides a mechanism for cleaning up hazardous-waste sites, 42 U.S.C. 9604, 9606 * * *, and imposes the costs

of the cleanup on those responsible for the contamination, §9607." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989), overruled on other grounds by *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).

The President's authority under CERCLA, most of which has been delegated to the Environmental Protection Agency (EPA), includes the power to compel cleanup actions by responsible parties or to undertake a federal response and recover expenses from responsible parties. 42 U.S.C. 9604, 9606; 42 U.S.C. 9607 (1994 & Supp. V 1999). "CERCLA places the ultimate responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons,'" by authorizing the United States, as well as other parties that incur eligible response costs, to recoup expenses through cost-recovery actions against parties that contributed to the release or threatened release of hazardous substances. *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)); accord *Kaiser Aluminum & Chem. Corp.* v. *Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992). "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *United States* v. *Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (quoting *Union Gas*, 491 U.S. at 21 (plurality opinion of Brennan, J.).

Section 107(a)(3) of CERCLA imposes liability on various classes of responsible parties, including persons who have owned or operated facilities at times when disposal of hazardous substances occurred, transporters of hazardous substances, and, as relevant here, "any person who by contract, agreement, or otherwise

arranged for disposal or treatment * * * of hazardous substances owned or possessed by such person, by any other party or entity, at any facility." 42 U.S.C. 9607(a)(3).

Courts have consistently ruled that, once the United States has established the elements of CERCLA liability, the responsible party is strictly liable for the government's response costs and is jointly and severally liable for the entire harm if the harm from the release of hazardous substances is not divisible. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Responsible parties who are found jointly and severally liable may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173. "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

2. This case addresses massive environmental damage caused by dioxin-bearing hazardous wastes disposed in Jacksonville, Arkansas, as a result of the operation of a pesticide and herbicide manufacturing plant. The United States has incurred more than $100 million in response costs and interest in its cleanup effort. Pet. App. 9a. The government originally brought an action for injunctive relief under the Resource Conservation and Recovery Act of 1976 (RCRA), 42

U.S.C. 6973, against Vertac, the then-current owner and operator of the site, and Hercules, which owned the site and equipment from 1961 to 1976 and operated the facility from 1961 to 1971. Later, the government brought claims for relief under Section 107(a) of CERCLA, 42 U.S.C. 9607(a), to recover its response costs from responsible parties. Pet. App. 10a. Other potentially responsible parties were subsequently brought into the suit, including petitioner. *Id.* at 37a. A number of parties settled and entered into consent decrees. *Ibid.* On October 12, 1993, the district court granted summary judgment against Hercules, finding that Hercules was jointly and severally liable to the United States under CERCLA Section 107(a) for costs incurred in the cleanup effort. *Ibid.*

Petitioner's liability as an "arranger" under Section 107(a)(3) is based on facts established at a trial held in November 1993. In 1978 and 1979, petitioner paid Vertac to produce more than a million pounds of the herbicide 2,4,5-T from a raw material, 1,2,4,5-tetrachlorobenzene (TCB), that petitioner owned and supplied for processing. Pet. App. 45a. Petitioner brought the TCB into the United States under temporary import bonds, under which petitioner paid no import duties pursuant to its declarations to the United States Customs Service that it owned the TCB; that it was bringing the TCB into the country solely for processing and not for sale; and that it would own the TCB during the entire time it was in the country. *Id.* at 46a. Petitioner required Vertac to store its materials separately in a warehouse that petitioner rented from Vertac, as a means of protecting petitioner's materials from Vertac's creditors. *Id.* at 47a. Petitioner also instructed Vertac to provide insurance for petitioner's TCB and 2,4,5-T while it remained at the site. *Ibid.*

In arranging for the processing of its TCB, petitioner understood that the process for manufacturing 2,4,5-T generates hazardous wastes, including dioxin, that require disposal. Pet. App. 47a. Indeed, petitioner's agent had inspected the Vertac site at the time that Vertac was storing thousands of dioxin-laden industrial drums above ground. 48 C.A. App. 12,914. Petitioner additionally knew that the processing of the TCB that it provided necessarily resulted in hazardous waste disposal and spillage, as evidenced by the fact that petitioner provided sufficient TCB to cover the amount of the material it anticipated would be lost through waste and spillage. Pet. App. 46a.

The processing of petitioner's TCB into 2,4,5-T resulted in the disposal of hazardous substances at the Vertac site. In addition to the inevitable leaks and spills resulting from the production process, dioxin was removed from the 2,4,5-T with toluene, which was then distilled into dioxin-laden still-bottoms. Pet. App. 48a. Those still-bottoms were stored in 55-gallon drums, which leaked, resulting in the contamination of soil on the Vertac Site. *Ibid.*

On May 21, 1997, the district court ruled that petitioner was jointly and severally liable as an "arranger" under CERCLA Section 107(a)(3). Pet. App. 31a, 75a. The district court specifically relied on factual findings that petitioner owned the TCB it supplied to Vertac for processing into 2,4,5-T, that the processing of petitioner's TCB into 2,4,5-T inherently generates and requires disposal of hazardous wastes, and that the processing did, in fact, result in improper disposal and release of hazardous wastes into the environment. *Id.* at 53a.

The district court had previously found Hercules liable for the release of hazardous substances at the

Vertac site and at landfills, neighborhoods, and off-site areas where cleanups had been undertaken, and had rejected Hercules' argument that joint and several liability was inappropriate because the harm at the site was "divisible." Pet. App. 11a. Following its finding that petitioner was liable, the district court addressed the issue of allocation of costs between Hercules and petitioner. It determined that Hercules' share of the response costs should be 97.4% and petitioner's share should be 2.6%. *Id.* at 12a.

Petitioner and Hercules appealed a number of the district court's determinations. The court of appeals rejected petitioner's contention that the evidence failed to support the conclusion that it had arranged for disposal of hazardous substances. Pet. App. 24a. The court looked to "the totality of the circumstances" to determine that petitioner's arrangement with Vertac to have its TCB processed into 2,4,5-T, with knowledge that a certain amount of spillage and disposal of hazardous waste was inherent in the process, was, in fact, an arrangement for disposal. *Id.* at 26a- 27a.

With respect to Hercules' claims, the court of appeals held that the district court used an improper standard for considering Hercules' argument that it should not be held jointly and severally liable because the harms at the site were "divisible." Pet. App. 22a. The court remanded the question of Hercules' joint and several liability so that the district court "c[ould] address the evidence supporting divisibility in light of the proper legal standards." *Ibid.* In light of the remand on the issue of divisibility of harm, the court of appeals did not address petitioner's and Hercules' takings and due process claims; nor did it reach arguments regarding whether particular costs claimed by the United States could be recovered, or whether the apportionment of

costs between petitioner and Hercules was proper. *Id.* at 27a-28a.

ARGUMENT

The decision of the court of appeals is unsuitable for review at this time because it is interlocutory. The court of appeals concluded only that petitioner is liable as one who "arranged for disposal" of hazardous substances, without reaching other issues relating to the proper amount of the government's recovery, or addressing petitioner's constitutional claims, which the court of appeals found "not ripe" at this stage of the case. Pet. App. 26a-28a. Petitioner's challenge to the court of appeals' decision that petitioner is liable for a presently undetermined portion of the response costs is not appropriate for resolution at this point in the ongoing proceedings. In any event, the court of appeals did not err in affirming the district court's finding that, under all the facts presented, petitioner "arranged for disposal" of hazardous substances as an inherent part of its arrangement with Vertac to have its TCB processed into 2,4,5-T. Pet. App. 53a. Petitioner's contention that the lower courts are in conflict on the elements of "arranger" liability under CERCLA is mistaken and does not provide a basis for this Court to take the extraordinary step of granting interlocutory review. *Id.* at 53a.

1. The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). It takes that step only in the "exceptional case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr.*

Co. v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893); accord *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree," and the absence of a final judgment may "of itself alone furnish[] sufficient ground for the denial of the application"). This case does not present the exceptional circumstances that might warrant the Court's intervention. The court of appeals merely applied settled CERCLA precedents to affirm the finding that the evidence as a whole indicated that petitioner "arranged for disposal" of hazardous substances as part of its herbicide formulation arrangement with Vertac. Pet. App. 27a. Furthermore, the court of appeals vacated important aspects of the district court's judgment and remanded for further proceedings that may affect the scope of petitioner's liability. *Ibid.* The remand proceedings will address petitioner's constitutional arguments, which the court of appeals concluded "are not ripe for our consideration," as well the apportionment of liability between Hercules and petitioner, which may bear on the practical need for this Court's review. See *id.* at 27a-28a.

As this Court has noted, "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." See *American Constr.*, 148 U.S. at 384. The court of appeals' interlocutory decision presents such a situation. Granting review now would disrupt the progress of this complex case and could lead to multiple, piecemeal requests for review—precisely the result that this Court's practice of denying interlocutory review is designed to avoid. In light of the current unsuitability of this case for review, petitioner should be required to preserve its objections, appeal from any adverse final

judgment on remand, and, if necessary, seek review from this Court at a later date. See *Hamilton-Brown Shoe*, 240 U.S. at 257-259; *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari); R. Stern et al., *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

2. Even if the court of appeals' decision were not interlocutory, it would not warrant review. Petitioner asks this Court to resolve an alleged "split among the Circuit Courts of Appeals" created by "the Courts of Appeals' use of different standards to decide 'arranger liability.'" Pet. 12. Petitioner suggests that "confusion and unfairness" could be avoided if this Court were to hold that arranger liability under Section 107(a)(3) hinges on a showing of an obligation to control the disposal or treatment of hazardous substances. *Ibid.*

Petitioner errs both in its identification of an alleged "conflict" and in its prescription for a strict rule requiring that an "arranger" have an obligation or ability to control the disposal of the hazardous substances at issue in order for liability to attach. The courts have followed an intensely factual, case-by-case approach in determining the application of arranger liability. Those courts have observed that CERCLA does not define the phrase "otherwise arranged for disposal," 42 U.S.C. 9607(a)(3), and they have rejected reliance on any "*per se* rule" in applying that term to the wide variety of factual situations in which it may come into play. See *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990).

In particular, the courts have refused to adopt a per se rule requiring a showing of control over the waste disposal process. See *Catellus Dev. Corp.* v. *United States*, 34 F.3d 748, 752 (9th Cir. 1994) ("Requiring continued ownership or control for section 107(a)(3) li-

ability would make it too easy for a party, wishing to dispose of a hazardous substance, to escape by a sale its responsibility to see that the substance is safely disposed of."); *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996) ("[A] party can be responsible for 'arranging for' disposal, even when it has no control over the process leading to the release of substances."); *Cadillac Fairview/Cal. Inc.* v. *United States*, 41 F.3d 562, 565 (9th Cir. 1994) ([A]rranger liability "is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process."); *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1087-1088 (8th Cir. 1995) ([A]rranger liability may be established either by proof that the defendant exercised "some level of actual participation" in activities causally related to the arrangement of hazardous waste disposal or by proof of actual "control" over the disposal arrangements.). As those decisions recognize, and as the court below correctly concluded, "[c]ontrol * * * is not a necessary factor in every case of arranger liability." Pet. App. 25a.

Liability as an "arranger" is not dependent on any one factor but hinges on a variety of factors peculiar to the particular transactions at issue. Control or authority to control disposal may take on significance in situations in which the potentially liable parties are not involved in a close business relationship that contemplates the use and disposal of hazardous substances. For example, in *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992), General Electric sought to hold several oil companies liable as entities that arranged for the disposal of waste motor oil that was stored by dealers at service stations that the dealers leased from the oil companies. General

Electric maintained that the oil companies, as lessors, had the authority to control the manner by which its dealers disposed of waste oil and that the oil companies could have prevented the dealers from contracting with a waste oil scavenger who improperly disposed of the oil. *Id.* at 283. The Second Circuit rejected that argument, stating that "there must be some nexus between the potentially responsible party and the disposal of the hazardous substance." *Id.* at 286. Unlike the situation here, there was no relationship at all between the purportedly liable oil companies and the waste oil scavenger that disposed of the hazardous substances. The court of appeals concluded in those circumstances that the mere potential authority to control disposal was not enough, by itself, to provide the necessary connection to show an arrangement for disposal in that case. *Id.* at 287-288.

Contrary to petitioner's suggestion (Pet. 6-7), *General Electric* hinged on the peculiar facts of the case and not on any *per se* rule requiring a showing of control or ability to control. The court of appeals in that case specifically emphasized that "[u]nlike the defendants in * * * [*United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989)], the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated." *General Elec.*, 962 F.2d at 287. Moreover, "[t]o the extent that the oil companies did exercise control over certain aspects of their dealers' businesses, none of it was directed toward either the generation of or the disposal of waste oil." *Ibid.* In this case and in *Aceto*, by contrast, the liable party retained ownership

of the hazardous substance and exercised control over the process that generated the waste.[1]

Petitioner is also mistaken in suggesting (Pet. 10) that *South Florida Water Management District (South Florida)* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996), establishes a rigid test for arranger liability that turns on control over disposal. That case reaffirms that courts must "reject[] any attempt to substitute a *per se* rule for the phrase 'arranged for,'" and should instead "focus on all of the facts in a particular case." *Ibid.* In *South Florida*, pesticide sprayers who had spilled hazardous chemicals on and around their airstrip, filed a third-party complaint against the landowners who had contracted for the sprayers' services. *Id.* at 405. The court found that the relationship between the landowners and the sprayers did not form a basis for a finding of arranger liability as to landowners because "the [s]prayers have simply not alleged the Landowners had sufficient knowledge of *or* control over the [s]prayers' disposal practices to be held liable." *Id.* at 409 (emphasis added). The court found (*id.* at 408) that the relationship between the landowners and the sprayers bore "little resemblance" to the relationship between the parties to the pesticide formulation contract considered in *United States* v. *Aceto Agricultural Chemicals Corp.*, *supra*:

> In *Aceto*, the mixing and packaging of pesticides 'inherently' involved the creation of hazardous wastes such that the manufacturers should have expected the formulator would have to dispose of

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[1] The court of appeals found "no basis to reverse the district court's finding that Uniroyal owned the material throughout the transaction," Pet. App. 27a, and petitioner does not contest that finding here.

> these wastes as part of the service they were purchasing.

South Florida, 84 F.3d at 408.

The court of appeals in this case correctly concluded that the situation here is governed by *Aceto*. See Pet. App. 23a-25a. It bears no resemblance to either *General Electric* or *South Florida*. As in *Aceto*—and unlike the situation in *General Electric* or *South Florida*—petitioner owned the pertinent hazardous materials throughout the manufacturing process and arranged for its materials to be processed in a manner that petitioner knew would generate wastes that would require disposal. See pp. 5-6, *supra*. The district court found that the agreement between petitioner and Vertac "provided for waste and spillage of the TCB during processing into 2,4,5-T" by requiring petitioner to supply more TCB than would have been necessary in the absence of waste or spillage. Pet. App. 46a. Petitioner thus participated in the fundamental chemical processing decisions that directly led to the improper disposal of hazardous waste. Where waste disposal is an inherent part of the process, as here and as in *Aceto*, the party who has arranged for the processing may also be properly found to have arranged for the accompanying disposal of the resulting hazardous wastes.[2]

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[2] While authority to control the means of waste disposal is not a requirement for liability, petitioner did in fact exercise control over aspects of the manufacturing process and could have exercised control over the disposal of hazardous wastes in this case. Petitioner demonstrated its ability to exercise that control by insisting that its TCB be stored separately and that it be insured. Pet. App. 47a. Petitioner is incorrect in its assertion (Pet. 4), without citation to the record, that "the parties stipulated in the District Court that [petitioner] exercised no control over Vertac's

In sum, the decision below is consistent with the decisions of the other courts of appeals that have addressed the issue of arranger liability under CERCLA. There is no conflict among the courts of appeals warranting this Court's review. Indeed, even if the limited number of decisions exhibited any tension on the issue presented here, there would be no warrant for addressing that tension through review of a case that is presently in an interlocutory posture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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manufacture of 2,4,5-T or over the operation of the Vertac plant." Petitioner is perhaps referring to a colloquy from a 1993 jury instruction conference, in which the United States simply agreed that "there is no evidence in this case that Uniroyal exercised any control over the *disposal* of the hazardous waste." 11/17/93 Tr. 40 (emphasis added). Petitioner's failure to exercise control over the disposal of wastes does not establish that it could not have done so, just as it chose to exercise control of other aspects of the manufacturing process, such as the storage and insurance of the raw material whose processing necessarily resulted in the disposal of hazardous wastes.